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SUPREME COURT U.S.

No. 81 5192

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JEFFREY STUART DICKS

Petitioner

v.

STATE OF TENNESSEE

Respondent

Petition for a Writ of Certiorari to the Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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AUGUST, 1981

QUESTIONS PRESENTED

1. Does the Tennessee courts' application of the hearsay rule, under the facts of this case, violate the Due Process Clause of the Fourteenth Amendment as previously delineated by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979), insofar as to prevent a witness of overwhelming trustworthiness from testifying for the accused that someone else confessed to specific portions of the crime at issue, which confessions, when considered in the light of other undisputed evidence, drawn from the state's own proof, essentially amount to a confession that he committed the entire murder himself and arguably indicate that he committed the entire underlying felony on his own as well?

2. Where the Tennessee Supreme Court has apparently arbitrarily and capriciously refused to admit the very existence in the record of certain "statements" by the codefendant, Strouth, which are patently apparent in the testimony of Barbara Davis, and has subsequently refused to apply its own evidentiary law, which it openly admits in its opinion would apply if such statements existed, do such actions violate the Due Process Clause of the Fourteenth Amendment and the Assistance of Counsel Clause of the Sixth Amendment?

3. Where, as here, there is substantial evidence which suggests that the defendant was, if guilty at all, at worst merely a marginal participant in the scheme and actions of another whose felonious assault resulted in a murder committed without the defendant's knowledge and outside of his presence, and where the state's statutory provisions for the conviction of first degree murder and the imposition of the death penalty require no finding by the jury that the defendant was anything more than a marginal participant in a felony which resulted in a murder by his codefendant, does the infliction of the death penalty on such a defendant violate the Cruel and Unusual Punishments Clause of the Eighth Amendment?

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OPINION BELOW

The opinion of the Tennessee Supreme Court is reported at 615 S.W.2d 126 (Tenn. 1981). No written opinion was rendered by any lower court. Copies of the opinion and the opinion denying the petition to rehear are attached as Exhibits A & B. Attached as Exhibits C and D are the respective judgment orders.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered February 2, 1981, and the defendant-appellant's petition to rehear was denied May 4, 1981. Mr. Justice Stewart signed an order on June 22, 1981, extending to August 2, 1981, the time for filing the petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides in pertinent part:

> ...[C]ruel and unusual punishments [shall not be inflicted].

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

State Statutory Provisions Involved

T.C.A. §39-2402 provides in pertinent part:

> (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing or committed in the perpetration of, or attempt to perpetrate any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.
>
> (b) A person convicted of murder in the first degree shall be punished by death or imprisonment for life.

T.C.A. §39-2404 provides in pertinent part:

> (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

* * *

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

* * *

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

Punishment of Death

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found.]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/_____ Jury Foreman	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror

* * *

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

* * *

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

* * *

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft priacy, or unlawful throwing, placing or discharging of a destructive device or bomb.

* * *

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but substantially affected his judgment.

* * *

STATEMENT

A. The Trial

The petitioner Jeffrey Dicks was charged with felony murder and put on trial for his life. He was convicted and sentenced to death by electrocution. He based his defense upon his testimonial assertion that he had merely driven his friend Donald Wayne Strouth (known as "the Chief", Strouth was a codefendant who had previously been tried separately from the petitioner for the same murder and who had been convicted and sentenced to death) to the store in question. Dicks had unknowingly waited outside for his friend, while inside, unbeknownst to the petitioner, Strouth was robbing and brutally murdering an elderly shopkeeper, Mr. Kimmy Keegan.[1]

The petitioner had no means of attempting to corroborate to the jury his lack of specific knowledge as to Strouth's purposes, but he did seek to corroborate his lack of any active participation in Strouth's actions (and his absence from the inside of the store where the murder took place) by offering as a witness one Barbara

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[1] Petitioner voluntarily admitted that Strouth had earlier tried to talk him into committing a robbery but insisted that he had not believed Strouth, who was "always talking about robbing banks," which petitioner had never believed before either.

Dr. David McMillan, a clinical psychologist who had examined the petitioner, was offered as a witness at trial and refused by the court: Dr. McMillan did testify at the sentencing phase and stated that petitioner suffered from a "character disorder", in that he was a "passive, dependent personality" (Tr. 1356) who gravitated or tended to attach himself to "dominating" people who would make his decisions for him (Tr. 1352) "even to ordinary daily events such as where to go, when to go, how long to stay." (Tr. 1192) Petitioner's tests showed "a considerable amount of dependency" on others to cope with day to day events (Tr. 1350) and a significant inclination "toward passivity." (Tr. 1350) The petitioner is what psychologists call a "desert personality", "meaning that there is really not much inside" (Tr. 1350) and that petitioner lacks the ordinary person's capacity to filter and relate to the events of the day to day world. (Tr. 1189) Lacking a functionally normal personality, the petitioner is left with nothing to deal with daily events except his isolated intelligence. (Tr. 1189) Petitioner's intelligence quotient is 90. (Tr. 1348) Petitioneris "not very competent [or] able to do things and cope with stress on [his] own." (Tr. 1350) Petitioner would seek out "somebody else to be in charge" (Tr. 1352), "[a]nybody who would take charge of things who would let him depend on them." (Tr. 1191)

When given a hypothetical question asserting the facts of the murder of Jimmy Keegan (crushed head, slit throat, etc.) and asked whether the petitioner could participate in such actions, Dr. McMillan testified that "[h]is passivity being such, I would not visualize him taking that kind of action," admitting this to be speculative. (Tr. 1355)

Davis, the girlfriend of the codefendant Strouth, who had been the state's star witness at the earlier trial of Strouth, who had testified there (only after being threatened with prosecution as an accessory after the fact should she refuse) as to certain statements against penal interest made by Strouth within the intimacy of their relationship (they were living together both before and after the crime, up to Strouth's arrest). These statements indisputably tend to show that Strouth alone committed the murder of the shopkeeper when taken in conjunction with other undisputed evidence, discussed infra, Section C.

Despite the fact that the State had previously offered the identical evidence from the identical witness as its pièce de résistance at the Strouth trial, both the state and the trial court insisted, after a jury-out hearing, that such testimony was merely hearsay and could not be permitted under any circumstances. (It should be also noted that two other witnesses testified at the Strouth trial as to nearly identical statements made separately to each by Strouth; for some reason the attorneys who represented petitioner at trial failed to offer them as witnesses, apparently because of the court's ruling on Miss Davis to the effect that "all statements by Donald Strouth are inadmissible."[2] However, their testimony is of record in the transcript of the Strouth trial and would, of course, further support the petitioner's assertions of innocence.)

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[2]This is reflected as follows in the record:

MR. WEDDINGTON: The essence of the ruling is that you're not allowing any out of court statements by Mr. Strouth to Miss Davis?

THE COURT: Yes.

MR. WEDDINGTON: That hearsay is not allowed.

GENERAL WELLS: I'd say that would go to any other witnesses also

THE COURT: Yes.

(Tr. 1227)

* * *

THE COURT: That will be all. I rule that the hearsay testimony of Miss Davis and other hearsay testimony of that nature is not admissible. All right. Do you have other witnesses?

MR. SMITH: We just respectfully except to your ruling.

THE COURT: All right. The Court will be adjourned until 1:00....

(Tr. 1233)

B. The Appeal

Upon appeal of petitioner's conviction, the Tennessee Supreme Court admitted that such evidence was now admissible under Tennessee law (see Smith v. State, 587 S.W.2d 659, 661) but reached, in only two sentences, the holding that "[b]ut appellant did not seek to have Miss Davis testify as to statements made by Strouth, but sought to have her testify as to impressions she formed from conversations she had had with Strouth. These impressions do not come within the exception rule to permit introduction of declarations against penal interest, and the trial judge properly excluded such testimony." State v. Dicks, 615 S.W.2d 126 at 129 (Tenn. 1981).

Petitioner immediately responded with an urgent petition to rehear and a brief in support thereof detailing at length the court's misapprehension of the issue as presented by the record: specifically, the trial judge never thought or ruled that the proffered testimony was excludable as "impressions" but instead ruled that any prior statement of any kind by Strouth to another person could only be hearsay. Only one "impression" was offered by the witness, a statement that "I always felt [Strouth] was guilty" because of "what he had said" and that "[Strouth] sounded like he was taking responsibility for the whole thing" (Tr 1220-21); this was indeed noted by the trial judge as "only her opinion." (Tr. 1223) However, the witness Barbara Davis offered testimony concerning four specific statements by Donald Strouth which were in no conceivable perceptual way mere impressions, as follows:

1. Strouth said that "he [Strouth] hit the man and the man went down....talking about himself." (Tr. 1218, lines 15-18);

2. Strouth said he "only gave him (Jeff Dicks) $25.00" (out of the total proceeds of the crime, $220.00-230.00), which was stated in the context of his "putting Jeff down" (Tr. 1218, lines 13-15); see also 1220, lines 1-2);

3. When Strouth was asked "what Jeff's part in this was" he responded "ah, Jeff," in a manner that "[h]e was putting Jeff down" (Tr. 1218, lines 9-13);

4. The witness Davis admitted that, at the trial of Strouth, she had testified that Strouth had specifically told her that "Jeff froze on me" (Tr. 1218-19); the witness explained that she had paraphrased the statement in the use of the word "froze," because she did not think the police could make anything out of the words "Chief" (Strouth) had actually said to her (Tr. 1220, lines 17-21). (The witness in no way repudiated the import of the testimoney, instead insisting that the words used by Strouth sounded like Strouth "was taking responsibility for the whole thing.") (Tr. 1220, line 17; Tr. 1221, line 8). (As the arguments concerning admissibility erupted, the precise word of Strouth was never elicited.)

Since the court had previously admitted in its opinion that such statements against penal interest were fully admissible under current Tennessee law, as applicable to this case, and since the remainder of the petition to rehear delineated at great length the enormous importance of these statements to the jury's determination of this death penalty case (as outlined in Section C, below), petitioner was hardly prepared for the court's one sentence denial of the petition as "not well taken" (the court's original opinion has also devoted only a small paragraph to this complex [in the event] and determinative issue).

C. Particular Relevancy of the Statements at Issue

To understand the tremendous relevance of the statements at issue in this case, one must first understand that there is undisputed evidence presented by the state that Donald Wayne Strouth actually murdered the seventy year old victim in this case by cutting his throat "from ear to ear" with the knife previously given to him as a present by his girlfriend, Barbara Davis (to whom Strouth admitted having discarded the knife shortly after the crime, along with the jeans he had been wearing which were clearly stained

with blood).[3] The state's own evidence also indicates that the victim was first smashed on the head and knocked unconscious by a rock, that he had already been knocked unconscious when his throat was cut (the state's pathologist thus asserts, noting the absence of blood on the victim's hands which would have instinctively gone to his throat had he been conscious), and that approximately $220-$230 constituted the proceeds of the crime.

The questions raised for resolution by the jury in the conflict of the respective theories of the state and the defendant were these:

1. Was the defendant a party to the actual, physical murder of the victim, as maintained by the state throughout, by smashing him on the head with a rock before Strouth later cut his throat;

2. Was the defendant inside the store at all;

3. If outside the store, was the defendant participating in the robbery at all or was he, as he maintains, confused and frightened and uncertain as to what was happening?[4]

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[3]Ms. Davis was called by the state and forced to testify as to certain actions by Strouth witnessed by her; reference to the numerous admissions of Strouth to which she had testified at the Strouth trial were prohibited by the court upon request by the state. (Tr. 985, 989) Cross-examination as to Strouth's statements to her was not permitted, and when the defendant later called Ms. Davis, her testimony and any other testimony regarding statements by Strouth was excluded by the court.

[4]Note that these questions rise in a graduated series of steps: if number 1 is decided in favor of the state, the jury never reaches numbers 2 and 3, and number 2 must also be decided in favor of the defendant to reach number 3. Thus, anything which affects the defendant's ability to prove his case with respect to question number 1 is dispositive of his ability to prove his case in question number 3, and therefore despite any of the "guilt by association" ramifications of felony murder, the issues raised by the exclusion of the evidence at issue here cannot be relegated solely to a question of punishment, for the intent to participate in the felony is still a fundamental issue even in felony murder and the defendant was cheated of his right to prove his innocence in each of questions 1 and 2 so that the jury would be forced to consider the question of intent raised by question number 3. This case is fundamentally one of the right to establish a defendant's innocence.

Once these undisputed facts are known and the issues understood, the tremendous relevancy of the statements at issue (listed at pp.10-11, supra) is immediately apparent. Strouth's admission that he "hit the man and the man went down" obviously refers to the assault with the rock and answers question number 1 by itself; viewed in conjunction with the undisputed fact that Strouth cut the victim's throat, it is seen that the petitioner was not involved in the physical act of murdering Jimmy Keegan.[5]

Strouth's derogatory response to Barbara Davis' questions as to "what Jeff's part in this was" (saying "ah, Jeff" in a manner that "[he] was putting Jeff down"), his statement to Miss Davis of words to the effect that "Jeff froze on me," and most of all his admission that he "only gave him (Jeff Dicks) $25.00" (out of the context of his consistent "putting Jeff down") all contribute strongly, when taken together, to the possible resolution by the jury of question number 2 in favor of the defendant. Each is also strikingly consistent with the petitioner's testimony that he accompanied Strouth to the store, unaware that Strouth seriously intended to commit a robbery, and that he remained outside, nervous and frightened and uncertain as to what was happening. Certainly such actions might well be conceived by the aggressive Strouth as meaning Dicks froze under pressure. Clearly these statements make the possibility of such a resolution of the question by

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[5]It should also be noted that at the Strouth trial both Ms. Davis and another witness, Jeffrey Duane MacMahan, testified that Strouth specifically admitted using "a rock"; according to MacMahan, Strouth "said he hit some man on the head with a rock and had killed him." Ms. Davis also testified that Strouth at one time mentioned having committed a robbery using the knife she had given him a few days earlier, while Mrs. Betty Dicks (the petitioner's wife) testified that Strouth told her "I robbed him and then I had to hurt the man.... I had to slit his throat." This material was never presented by the attorneys who represented the petitioner at trial, obviously due to the court's exclusion of all statements by Donald Strouth to a third party, but it is all of record in the case of State v. Strouth. Counsel for petitioner do not have access to the Strouth transcript since that case is still before the appellate courts of Tennessee; therefore the above quotations were taken from the detailed contemporaneous accounts of the trial by the Kingsport (TN) Times-News, Sept. 1, 1978. While the counsel may not therefore vouch for the word-by-word accuracy of the quotations above, they have been verified as to existence and essential substance by an examination of the "Statement of the Evidence" in the State Attorney General's brief in State v. Strouth, (pp. 19, 21, 22, 25-26).

the jury infinitely more probable than it was without this evidence:[6]

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[6]The facial value of the statement in which Strouth admitted only giving $25.00 to the petitioner is only a fraction of the statement's arguable value to the petitioner as jury argument. The $25.00 is obviously a mere pittance of the $220.00-230.00 robbery proceeds, and as such on its face the statement would indicate that petitioner did no more than accompany Strouth on the underlying felony. However, Strouth's particular phraseology (he "only gave [Jeff Dicks] $25.00"), which particular phrasing was specifically noted twice by the witness (Tr. 1218, 1220) is certainly open to the argument (Particularly in the context established by the witness wherein "[he] was putting Jeff down") (Tr. 1218) that Strouth disdainfully gave the petitioner something which had not been earned. This is all the more so when it is realized that Strouth desperately needed to get the petitioner out of Kingsport, since the petitioner could obviously lead the police straight to Strouth when the murder was discovered. Therefore, since the petitioner had no money (as was pointed out constantly by the state in argument), it was necessary that Strouth give him this pittance, in order to get Dicks out of town! (The money was spent on a motel room for that evening).

Furthermore, the statement on its face clearly shows that Strouth personally took all the money from the victim and maintained personal possession of the entire "loot" up until whatever time he deigned it necessary to dole out the subsistance-level sum that he gave the petitioner. This is entirely consistent with petitioner's testimony.

Interestingly enough, this testimony also corroborates the petitioner's general credibility in an unusual but effective way. The petitioner, who was terrified when Strouth came out of the store with blood on his hand and carrying merchandise, followed his natural instincts and fled, with his girlfriend (who later became his wife), to Erie, Pennsylvania, near the Canadian border, (after first splitting up with Strouth forever, by failing to meet him as arranged).

After a short time the petitioner returned on his own to his hometown in North Carolina, where he surrendered himself to the authorities. In the statement he gave to the police at this time he admitted receiving $20.00 from Strouth the afternoon following the crime.

The opinion of the Tennessee Supreme Court refers to the petitioner's admitting that he received a "few dollars" as supporting a finding that petitioner participated physically in the murder of the victim; quite probably the jury felt the same way and disbelieved (apparently like the court, with its quotation marks around the words "few dollars") the petitioner's denial that he had received no more than this pittance.

However, the testimony of Barbara Davis on this point corroborates the petitioner and shows unequivocally that he essentially told the truth in his statement; this corroboration raises an interesting and significant contention for the defense. If the petitioner told the truth in his statement (which was given, not in the inherent duress of a sudden arrest and confrontation, but after he had made the long trip from Erie, Pennsylvania on his own, with ample time to prepare a lie) about a detail which on its face tends to implicate him at least marginally in the robbery, and when he had no reason not to lie (since no one should have known this fact but Strouth), is it not possible he was telling the truth about everything?

Whether the jury would have believed the petitioner because of this argument or not, he would certainly have been in a far stronger position with this argument to give the jury than he was without it, for the jury already had heard the information in question, from his statement and his testimony, and any negative connotations to this evidence had already been absorbed by them. The positive aspect of this proof, illustrated above, does not arise without the corroboration provided by this part of the erroneously excluded testimony of Barbara Davis.

The urgency of petitioner's need for the admission of this evidence is magnified by the fact that, due to its erroneous exclusion, petitioner was unable to offer anything whatsoever in the way of admissible evidence to corroborate his own testimony. The jury was left with nothing to judge for the defense but the word of a man whose very position before them, as a criminal defendant on trial for his life and desperately seeking to present a defense, destroyed automatically whatever credibility he might have otherwise had. (This weakness in his case was hammered at repeatedly by the state in its closing arguments.)

Petitioner would also note that the witness offering the testimony at issue is literally as trustworthy a witness as can be offered in a court of law. It is undisputed that Ms. Davis was the girlfriend of the codefendant Strouth; that these statements were made to her within the privacy of their trailer and the intimacy of their relationship; that Ms. Davis sought to avoid testifying against Strouth at his trial (prior to petitioner's trial) and that she did testify only when threatened by the state with prosecution as an accessory after the fact. (Tr. 1010-11) The testimony is undisputed that Ms. Davis was merely an acquaintance of the petitioner, whom she knew only through Strouth, while she was deeply involved with the codefendant; in fact, the pretrial motions by defense counsel indicate that Ms. Davis steadfastly refused ever to talk with petitioner's attorneys (Tr. 165-66), and as a result the questions asked of her in the hearing at issue were plainly drawn directly from the Strouth trial transcript.[7]

Obviously, this testimony comes from one who is, in effect, a hostile witness! There can be no question whatsoever as to the trustworthiness of this testimony. The state itself has already vouched for every syllable of this evidence in presenting Ms. Davis as the star witness against Donald Strouth. (Note that this indisputable trustworthiness would also have tremendous effect on the weight of such testimony for the jury.)

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[7]Petitioner submits that this largely explains why his original counsel's examination of this witness is no more artful than it is, as well as why her testimony seems of less than optimal coherence at times; this witness had never been interviewed, much less coached.

Lastly, the excluded testimony is supremely important within the context of answering the theory of the state as repeatedly expressed — with noteworthy enthusiasm — in its arguments:

> ...what happened to Jimmy Keegan was not the act of one individual acting by himself. It was the act of two people. Use your common sense. If you are going to attack an individual, would you have a rock in one hand, and a knife in the other, or do you keep one hand free to ward off any possible retaliation. Use your common sense. Use your common sense in making that determination.
>
> (Tr. 1390, lines 2-8).
>
> ...I'm going to mention it again in closing because I think it is quite significant. And there was no comment about it by defense counsel because it is potent, and that is if you're going to rob someone even a man who is much older than you are, a seventy (70) year old man. If you're armed with a knife, you don't need to pick up a big rock to carry with you. You don't arm yourself with a rock and a knife. If you've got a knife, you don't need a rock. Right. But, if one has a knife, and the other one doesn't, the other one needs what is available, and rocks are readily available in this part of the country, ladies and gentlemen. They were there together, and I submit to you that Dicks used the rock, and crushed Jimmy Keegan's skull, and that Strouth finished him by the cutting of the throat. Death was the only alternative that this man ever had.
>
> (Tr. 1424, line 23; 1425, line 12). (Emphasis supplied).

But what if the jury had been told of Strouth's admission that he hit the victim and knocked him down?[8] Where the knife is unquestionably Strouth's, and the state itself admits he cut the victim's throat, and the state's own pathologist gives proof revealing that the victim's skull had already been crushed and he was lying unconscious for an undetermined length of time before his throat was cut, is it not patently obvious that the state's self-proclaimed "potent" argument would have shattered, self-destructed?

Instead, defense counsel was forced to ignore the issue (as pointedly noted by the state to the jury):

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[8]Or testimony offered by Jeffrey Duane MacMahan at Strouth's trial, discussed earlier, and implicitly ruled, with all such statements of Strouth, inadmissible herein by the trial court, (see ftnt. 2, page 9, supra) that Strouth "said he hit some man on the head with a rock and he had killed him" (discussed in ftnt. 5, page 13, supra).

Additionally, the state argued at enormous length as follows:

> Now ladies and gentlemen, common sense tells you, and you read about it everyday. Robberies take place all the time, armed robberies do. That's part of our society today. And that's a sad thing. But why in this case did they have to kill Jimmy Keegan? Why was he murdered? For whose sake did he lose his life? This is the man for whose sake he lost his life? This is the man for whose sake he lost his life. To prevent Jimmy Keegan from identifying the former customer, Jeffrey Dicks who was there before that who lived fifteen hundred (1,500) feet away with his girlfriend. Not Donald Strouth who was from Elizabethton, not Donald Strouth who saw him for the first time that day walking down the street, but to protect this man's identity because this is the man that he was familiar with. This is the man that he could eyewitness identify. This is the man that he could put the finger on because this is the man that he had done business with before. Yes, there was a reason for killing Jimmy Keegan, and this is also the reason why the law makes murder committed during the perpetration of an armed robbery, first degree murder to keep from killing witnesses,.... (Tr. 1299, lines 1-19).
>
> But they protected the identity of the man who was vulnerable to identification and the only one that was vulnerable to identification was this man, not Strouth, but Dicks. Strouth was from away from there, he was from Elizabethton,.... (Tr. 1229, line 23-25; Tr. 1300, line 1-2).
>
> And I submit to you that the killing took place to protect him from being identified with that killing because he was the one that was vulnerable to identification, not Strouth. Strouth was a stranger. When you rob somebody you know, when you rob somebody at gun point or knife point that you know and you know they know you, what chance have you got to get away with it if you don't kill your victim? What chance have you got to get away with it if you rob somebody you know and do business with if you don't kill them. Well, who knew Jimmy Keegan, not Strouth. This man. This man. They had to kill him. Because Keegan knew him, and that was their only chance of getting away with it. And they sacrificed Jimmy Keegan's life for two or three hundred dollars ($200.00 or $300.00) and to keep from getting prosecuted for armed robbery. (Tr. 1301, lines 7-20).
>
> And folks, there is one reason, and one reason only, why Jimmy Keegan is dead today, and that reason sits right there in that brown tan suit because he knew that man. He knew his face, he had seen him in his store, he had sold him clothes, and he could identify Jeffrey Dicks as being the individual who robbed him, and folks, that chance, that happenstance, of having purchased some used clothing from this man cost Jimmy Keegan his life. (Tr. 1388, lines 2-8).

...ladies and gentlemen, he was killed, not to protect Donald Strouth, but to protect this man, to keep the police from finding this man, identifying him, and arresting him and charging him with the armed robbery of Jimmy Keegan. That was why Jimmy Keegan died. It was not for Strouth's benefit, it was his benefit, and his alone because Mr. Keegan couldn't identify, he didn't know Strouth. The cold, calculating, pain, atrocious, cruel act, and ladies and gentlemen, it involved depravity of mind to do what was done to Mr. Keegan. It's not enough to beat his head, and to crush his skull, they've got to go further, slash his scalp and his head and his ear, and they go even further than that and slit open his throat, as a throat butchered out. He was left there lying on that floor to die and bleed, and slaughtered out, and bleed and die, and slaughtered out for the benefit of this individual sitting right here today. (Tr. 1388, lines 12-25; Tr. 1389, line 1).

He's the one that had to have Jimmy Keegan killed because Keegan had done business with him, not Strouth. He was the beneficiary of this killing. What did Strouth gain by it? Some advantage, yes, all right, but he was a stranger of the area. The chance of him being identified by Keegan would be remote. Keegan had never seen the man before. What are the chances, but Dicks was a different story. Dicks he had seen before. Dicks lived right down the block. Dicks had been there for a month. If Dicks was to participate in the robbery of this man, then this man had to die. (Tr. 1424, lines 5-14).

But, again, what if this jury had been given the evidence of Barbara Davis indicating that Strouth had killed the victim by himself (as illustrated supra, pp.11-13), as well as the other statements tending to indicate that petitioner was probably never inside the store (again, illustrated supra, pp.13-14)? Petitioner contends that even a cursory reading of these portions of the state s agrument shows clearly why the jury so readily imposed the death penalty against a defendant when they had been presented with no testimony actually placing him inside the scene of the crime.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. The Chambers Issue

A. How the Issue Was Raised

The witness Barbara Davis was called to testify for the state, primarily concerning actions by codefendant Donald Strouth (who had been previously established as being with the petitioner on the day in question, by the statement given by petitioner and read to the jury) (Tr. 983-1013). Before its examination of the witness, the state made a motion in limine:

> ...[the state asks] that the Court direct that no questions be asked of this witness designed to elicit hearsay statements made to her by the co-defendant in the case, Donald Wayne Strouth. The State does not intend to ask any of those questions designed to elicit that type of testimoney, and we would move in limine that the Court direct that no such questions be asked.
>
> (Tr. 985).

Petitioner's trial counsel objected to the motion and argued that these statements should be given to the jury. (Tr. 986). While petitioner's counsel never mentioned due process or the Fourteenth Amendment by name, he did argue as follows:

> MR. SMITH: Well, Your Honor, if he made — Donald Strouth is a co-defendant and he made an exculpatory statement with respect to Jeffrey Dicks, then we have a right to ask him about it. And if he's not available for testimony, and his attorneys object to his testimony based on the fifth (5th) amendment, then it becomes necessary for us to ask this lady right here hwat he said. I believe that would be the law very definitely.
>
> GENERAL WELLS: If the Court, please, it would still be hearsay.
>
> (Tr. 987).

Defense counsel further asked to subpoena Strouth from Brushy Mountain State Penitentiary, to show his unavailability as a witness; after a lengthy lecture to defense counsel concerning the lateness of such a request, the trial court ruled summarily:

> Now, my ruling is that this witness cannot testify as to hearsay statements made to her by a codefendant.
>
> (Tr. 989).

After defense counsel attempted a motion "[t]hat her testimony in teh former trial be made a part of the record for this trial outside the presence of the jury," the trial court sternly admonished counsel as follows:

> THE COURT: Gentlemen, Mr. Smith, you know how to get such testimony in the record. You have a law license, and you have it in another state. Now, you advise with counsel in this state and ascertain how to properly introduce that. The Court is not practicing law as an attorney in this case, and is not introducing evidence. You know — you should know — if you do not know how to get it into the record, then you ask other counsel or other members of the bar who are coming in and out of the courtroom and introduce such record of her testimony from the other trial. Now, let's proceed.
>
> (Tr. 990-91).

During the defense proof, counsel called Donald Strouth to the stand out of the presence of the jury, where he (through counsel) pled the First Amendment to anything asked of him, including his name. (Tr. 1206-1214).

Immediately thereafter, the defense called Barbara Davis to return to the stand, now as a defense witness. (Tr. 1214). The court noted that "I presume that the Defense wants to or intends to question Miss Davis about the matters that the Court ruled on yesterday," which was answered affirmatively. (Tr. 1216).

A jury-out hearing was held in which the four exculpatory statements (concerning the petitioner) of Strouth to Ms. Davis (discussed at length in the Statement of this petition) as well as other testimony by the witness, were tendered for the defense. (Tr. 1216-1221).

The court immediately held as follows:

> THE COURT: All right. Now, again, I hold that this time her statements are hearsay during this part of the trial and are not admissible.
>
> (Tr. 1221).

Defense counsel immediately objected and argued as follows:

> MR. WEDDINGTON: Your Honor, we enter an objection to that for the record, and except to His Honor's ruling because once — we feel like once a man invokes his right not to testify that the hearsay exception would not be proper in asking her what the man said to her. It seems that what he said would be the truth, declarations of his interest or whatever you might want to call it, and would be in a situation where these would be truthful statements and could be believed by a Jury. That's the purpose of the hearsay exceptions is to keep away from the Jury things that might in time some facts might get lost, might not be true. But we think in these circumstances that the hearsay exception should be allowed, except to that ruling for the record.
>
> (Tr. 1221).

Co-counsel, having asked for an opportunity to be heard, argued thusly to the court:

> ...in this particular case if Donald Wayne Strouth made a statement outside of the events of the res jeste to someone which excu — or tended to exculpate or exculpated a co-defendant, that that statement although ordinarily not admissible under the hearsay rule would be admissible if the declarant is unavailable to testify, to be cross examined about it. And the cases go in both directions, but I think in this particular case, Your Honor, the testimony, the hearsay or the exception to the hearsay type testimony which Barbara Davis just gave clearly exculpates or tends to exculpate the Defendant in this case. Number two (2), the declarant's availability is impossible. He has taken the fifth (5th) amendment, and number three (3), the circumstances under which the statement was made were such that it would have a very credible and believable function in front of the Jury. In other words, there would be no reason under the circumstances that she's told where she and Donald Strouth were talking together which would indicate that the statement that he made to her respecting the credibility of — respecting the culpability, if any, of Jeffrey Dicks is untrustworthy. It is in fact, according to the circumstances, very trustworthy statement. It is not made under any set of circumstances which would indicate that he was talking under duress or that he was talking in a state of mind that would discredit his truthfulness....
>
> (Tr. 1222-23).

Reference was shortly thereafter made by counsel to one of the statements made by the witness Barbara Davis that did not address a specific statement by Strouth, "[her] testimony [of] words to the effect that Donald Wayne Strouth accepted the culpability

of what happened to James Keegan"[9] to which the court made passing reference:[10]

> THE COURT: Well, those are not specific words that he said, that's an opinion she gathered from his attitude.

When counsel immediately sought to elicit further detail from the witness, he was abruptly cut off by the trial court, asking for argument from the state. (Tr. 1223) The trial judge unequivocally ruled as follows:

> MR. WEDDINGTON: The essence of the ruling is that you're not allowing any out of court statements by Mr. Strouth to Miss Davis.
>
> THE COURT: Yes.
>
> MR. WEDDINGTON: That hearsay is not allowed.
>
> GENERAL WELLS: I'd say that would go to any other witness also.
>
> THE COURT: Yes.
>
> (Tr. 1227).
>
> * * *
>
> THE COURT: That will be all. I rule that the hearsay testimony of Miss Davis and other hearsay testimony of that nature is not admissible. All right. Do you have other witnesses?
>
> MR. SMITH: We just respectfully except to your ruling.
>
> THE COURT: All right. The Court will be adjourned until 1:00.
>
> (Tr. 1233).

This issue was assigned as error in the motion for new trial, which was denied by the court; the Fourteenth Amendment was not specifically mentioned.

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[9] A: I always felt Chief was guilty.

THE COURT: From what he said to you?...

A: Yes. (Tr. 1220).

[10] It should be noted that this was never in any way an aspect of the trial court's ruling; it was merely a passing reference to counsel's comment. The trial court clearly recognized that specific statements by Strouth to the witness had been tendered by the petitioner, and the court clearly and equivocally ruled those statements inadmissible simply because they were hearsay. See Tr. 1221, 1227, 1233, all quoted supra.

On appeal[11] the petitioner's counsel did raise and specifically relied upon the Fourteenth Amendment as the basis for his assignment of error:

> The defendant maintains that this ruling by the court was in error and that such denied defendant a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.
>
> (Brief on Behalf of Appellant, p. 41)

Petitioner's brief cited Chambers v. Mississippi, 410 U.S. 284 (1972), as the basis for his claim in the Tennessee Supreme Court, and argued that case at length. The petitioner's argument concluded as follows:

> Because this very material and crucial testimony was excluded, such denied defendant a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.
>
> (Brief on Behalf of Appellant, p. 44)

The Tennessee Supreme Court, in its ruling on this issue (quoted in the argument, infra at p. 32), did not specifically refer to the Fourteenth Amendment, treating the issue as decided by Smith v. State, 587 S.W.2d 659 (1979).

B. Argument on Federal Question Jurisdiction

In Street v. New York, 394 U.S. 576, 572, the Court stated that "when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Petitioner submits that a factual review of the events surrounding his appeal, coupled with citations to the appropriate Tennessee law, will clearly show that the Tennessee Supreme Court implicitly overruled the petitioner's due process Chambers argument

As noted in the factual recitation supra, the issue herein was raised with specific reference to the Fourteenth Amendment for the first time in petitioner's appellate brief; however, the arguments offered by petitioner's trial counsel clearly relied at

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[11] T.C.A. §39-2406 provides for direct appeal to the Tennessee Supreme Court in death penalty cases.

length on the language of due process and effectively gave notice to the trial court that what was being challenged was the fundamental fairness of petitioner's trial should the statements of Strouth to Ms. Davis be excluded.

It cannot be denied that petitioner raised the due process issue in the Tennessee Supreme Court. In response to petitioner's reliance upon Chambers, the state in its reply brief simply relied upon Smith v. State, supra, a case which had been decided by the Tennessee Supreme Court immediately before petitioner's original counsel had completed and filed their brief, and of which petitioner's counsel had apparently been unaware. Smith had adopted declarations against penal interest as a hearsay exception where necessary indicia of trustworthiness were present. 587 S.W.2d 659, 661.

The state in no way indicated or tried to assert that the Chambers - due process issue asserted by the appellant was in any way improperly before the Tennessee Supreme Court. (Brief for the State, pp. 66-68). Thus, any such issue was never argued before nor addressed by the court.

The Tennessee Supreme Court adopted both the state's wholesale reliance upon the recent Smith opinion and the state's three-sentence assertion that Ms. Davis testified only that from talking "to Strouth she obtained the impression that Strouth was taking responsibility for the whole thing" (emphasis supplied) and the state's own assessment of the trial judge's rulings, that "[t]he trial court ruled that he would not allow her impressions since they did not affect the defendant's involvement in the crime." (Emphasis supplied). (Brief for the State, p. 66)[12]

Petitioner submits that any facial ambiguity in the court's reliance upon Smith, a state case, in response to petitioner's Chambers assertions is put to rest by an examination of Smith. In Smith (which as noted was a very recent decision), the court after adopting its hearsay exception was compelled to apply its

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[12]But see the rulings of the trial court, quoted supra.

new standard to a petitioner who relied exclusively upon Chambers v. Mississippi, supra, as compelling a less strict standard for the admission of such evidence (i.e., that any such declarations against penal interest, standing alone, without regard to indicia of trustworthiness, were admissible under Chambers). 587 S.W.2d 659 at 661. The Tennessee Supreme Court reviewed the facts of Chambers at considerable length, noting "unusually strong set of corroborating circumstances...present [there]" and the significance of the separate grounds relied upon in tandem by this Court therein. 587 S.W.2d 659 at 661-2. The court specifically held that "[t]he contnetion that Chambers requires the admission of uncorroborated hearsay statements against penal interest has no validity...." and very clearly held implicitly thereby that the due process standards imposed by Chambers upon the states were satisfied by the standards adopted in Smith. 587 S.W.2d 659 at 662.

Under these facts, it is only logical to construe the Tennessee Supreme Court's denial of petitioner's Chambers issue by reliance upon its opinion in Smith as an implicit denial on the merits of the federal question, where the state case cited and relied upon has recently addressed at great length the federal question herein raised and held that the standards of that state case satisfy the standards of the Constitution as articulated by this Court.

C. Applicable Tennessee Law

This is especially so in light of the applicable Tennessee cases and statutes, where the Tennessee Supreme Court has held as follows concerning the appellate consideration of constitutional issues:

> In fairness to the trial judge, we should point out that the question of the constitutionality of the statute was not urged during the trial of the case nor in the motion for a new trial. It was raised in this Court for the first time.
>
> Generally, appellate courts review only questions presented for determination in the trial court. [citations omitted].
>
> However, generally a constitutional question may be raised at any time. [citations omitted].

> Also, the rule will be waived in cases involving the deprivation of life or liberty. [citation omitted].
>
> Veach v. State, 491 S.W.2d 81 (Tenn. 1973).

Furthermore, T.C.A. §40-3409 requires of the Tennessee Supreme Court as follows:

> No assignment of error or joinder in error is necessary in criminal cases taken to the Supreme Court, but the court shall render such judgment on the record as the law demands. (Emphasis supplied).

This statute has been held by the Tennessee Supreme Court to leave the court "bound, as suggested in the petition, to consider any errors in the record, whether there has been an assignment or not." James v. State, 215 Tenn. 221, 385 S.W.2d 86 (1964). That court has recently held that when "deal[ing] with an error of constitutional proportions" (such as, in that case, freedome from unlawful searches and seizures), "[w]hen it appears in the record of any criminal case that this constitutional guarantee has been ignored it becomes the duty of the reviewing court to heed the mandate of §40-3409, T.C.A. by "render[ing] such judgment on the record as the law demands." (Emphasis supplied) Goins v. State, 572 S.W.2d 644 (Tenn. 1978). "We are solemnly enjoined by §40-3409, T.C.A., that...[quoting the statute]" as a basis for finding the Tennessee ex post facto clause broader than its federal equivalent despite the failure of the appellant to assign error based on the Tennessee Constitution. Miller v. State, 584 S.W.2d 758 (Tenn. 1979). "This statute has been on our books for over a century. It was obviously passed for the benefit of criminal defendants, since it was aged when the Court of Criminal Appeals came into existence and, with rare exception, only the defendant had a right to appeal to the Supreme Court." Adams v. State, 547 S.W.2d 553 (Tenn. 1977).

Therefore, when the Tennessee Supreme Court has stated that the above statute is a "mandate" and a "duty" and that it is "bound to consider any errors in the record, whether there has been an assignment or not," particularly in constitutional questions, is it not more logical and more proper that this Court

should find that the Tennessee Supreme Court did consider the federal question properly raised by the petitioner's brief and never objected to by the state, and that the Tennessee Supreme Court implicitly overruled petitioner's federal constitutional claim by reference to its previous interpretation of that federal question in Smith v. State, supra, than that this Court should find the Tennessee Supreme Court to have evaded its "duty" imposed by T.C.A. §40-3409, by assuming the court to have avoided the federal question fairly raised by petitioner's brief?[13]

Petitioner submits that the above analysis clearly indicates that his claim was properly before the Tennessee court and therefore necessarily rejected, although silently, by the affirmance of the judgment. (See Chambers v. Mississippi, 410 U.S. 284, 303, White, J., concurring). Therefore the Court should accept the jurisdiction of this issue.

An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for new trial or assigned as error on appeal, in the discretion of the appellate court when necessary to do substantial justice.

II. The Remaining Issues

A. The federal question regarding the unequal and irrational application of state law by the Tennessee Supreme Court did not, of course, arise until the judgment and opinion affirming petitioner's conviction and death penalty. (See Appendix).

The issue was squarely raised in petitioner's Petition to Rehear and Brief in Support Thereof:

> Where, as here, the law of evidence sanctioned by the sovereign state clearly calls for the admission of such evidence as that at issue, and the evidence is instead suppressed, such action would be a violation of the inherent right to a fair trial guaranteed by the Tennessee Constitution and of the Sixth and Fourteenth Amendments to the United States Constitutions. (Brief in Support, p. 19).

B. The Eighth Amendment claim was raised specifically as a federal issue in the petitioner's motion for new trial, and overruled on the merits in the state court.

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[13] See also Tennessee Rules of Criminal Procedure, Rule 52(b).

REASONS FOR GRANTING THE WRIT

I.

THE REFUSAL OF THE TENNESSEE COURTS TO ALLOW THE PETITIONER TO PRESENT PROOF OF HIS INNOCENCE, BECAUSE OF THEIR MECHANISTIC APPLICATION OF THE HEARSAY RULE, IS A VIOLATION OF THE DUE PROCESS CLAUSE AS PREVIOUSLY DELINEATED BY THIS COURT IN CHAMBERS V. MISSISSIPPI, 410 U.S. 284 (1973), AND GREEN V. GEORGIA, 442 U.S. 95 (1979).

In Chambers v. Mississippi, supra, the Court held that the refusal of the state to allow the defendant to impeach his own witness, where that witness had repudiated the written confession he had given previously (which exculpated the defendant), and the state's refusal to allow the defendant to put on witnesses to testify concerning the same party's having confessed to said witnesses, cumulatively violated the defendant's due process right to a fair trial. The Court clearly held that the cumulative effect of these two errors was in flagrant violation of the Fourteenth Amendment and that the Court was therefore not required to determine whether either error, presented alone, would have required reversal of the conviction. (410 U.S. 284 at 298, 302-3). However, the language of the Court's opinion left little doubt that either error by itself constituted a denial of Chambers' right to due process, "in essence, the right to a fair opportunity to defend against the State's accusations." (410 U.S. 284 at 294). This is especially true of a state's unfair application of the hearsay rule, at least where, as in Chambers and as in the present case, (see under Statement, Section C, p. 15):

> The testimony rejected by the trial court... bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to [the petitioner's] defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> (410 U.S. 284 at 302).

Any question about the extent of the due process protection in such issues should have been put to rest by Green v. Georgia, 442 U.S. 95 (1979), a case which is remarkably on point with the instant petition. In a trial on (capital) sentencing only, the defendant sought to introduce testimony by a witness who had testified for the state at the separate trial of a codefendant (who was also sentenced to death), where he had testified as to admissions by the codefendant in which the codefendant admitted committing the murder alone. The Georgia courts ruled the testimony inadmissible as hearsay.

The Court in Green, with only one dissent, held that regardless of whether such testimony was hearsay, under these facts "its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment" inasmuch as the evidence was "highly relevant to a critical issue...and substantial reasons existed to assume its reliability.... Perhaps most important, the State considered the testimony sufficiently reliable to use it against [the codefendant], and to base a sentence of death upon it." (442 U.S. 95 at 97).[14]

The facts in this case and those in Green are amazingly apposite. The state will doubtless argue that the statement at issue in Green was a complete confession, in and of itself, and

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[14] Additionally, the district attorney in Green argued to the jury that it could infer that each codefendant participated in the murder from the fact that more than one bullet was fired into the victim's body, despite his knowledge of the confession which the state had presented as part of its case in the other trial. (442 U.S. 95 at 96). Identically, in this case the same prosecutors who had originally obtained a death sentence against Donald Strouth, using the testimony of Barbara Davis concerning his admissions of culpability, proceeded to prevent the petitioner from presenting the identical evidence to his jury and then argued to the jury that no one "would have a rock in one hand and a knife in the other" instead of keeping "one hand free to ward off any possible retaliation," and that "[i]f you've got a knife, you don't need a rock...and I submit to you that Dicks used the rock, and crushed Jimmy Keegan's skull, and that Strouth finished him by the cutting of the throat" (Tr. 1390, 1425; quoted at length in Statement, Section C, supra) when they were fully aware that Strouth had told Barbara Davis and Jeffrey Duane MacMahan, each a witness at his trial,that he had used the rock on the victim and killed him. (As noted supra in the Statement, the state effectively admitted throughout, as was warranted by the evidence, that Strouth used his knife to cut the victim's throat; therefore proof that Dicks did not use the rock amounts to proof that Dicks did not participate in the killing, equivalent thereby to the evidence in Green.

that the statements herein are not; and yet the entire thrust of the Statement tendered in this petition has shown that, when plugged into the factual context of the issues and the undisputed proof in this case, the statements at issue herein have the same functional effect as the confession in Green. Does due process turn its head and look away in these circumstances? Obviously, the statements herein are at the very least "highly relevant to a critical issue." (442 U.S. 95 at 97) (See ftnt. 4, supra at page 12).

The state would doubtless also insist that because Green dealt with a sentencing hearing it is inapplicable, but such an argument does not withstand scrutiny. This Court made no such distinction in Green itself, which turned upon the excluded evidence's high relevancy to a critical issue properly before the court at the time the evidence was offered as overriding the question of whether or not the testimony might be hearsay (where the evidence was inherently trustworthy). Obviously the petitioner's guilt or innocence was a critical issue properly before the court herein, and, as illustrated previously, it was impossible for him to attempt to demonstrate his innocence without first proving that he was not inside the scene and physically involved in the murder. (See ftnt. 4, supra, at page 12).

It is, in fact, obvious that the rights of the petitioner which have been violated by Tennessee's mechanistic application of its hearsay rules are even greater in number and import than those at issue in Green, for while Green's fundamental right to life was still at stake in his sentencing hearing, the petitioner herein was struggling to maintain that same right as well as his right to liberty, which was still at issue in this case at the time of the state's constitutional error. When weighed in the constitutional balances, the petitioner's cause is even stronger than that of Green's, for at the time of the disputed state action he remained fully clothed with the cloak of his constitutional presumption of innocence.

This reasoning is confirmed by the language of Chief Justice Burger's majority opinion in Estelle v. Smith, 49 U.S. Law Week, 4490, 4492 (May 18, 1981), in which the Court held that

"[g]iven the gravity of the decision to be made at the penalty phase [of a capital case], the State is not relieved of the obligation to observe fundamental constitutional guarantees" [otherwise taken for granted in a guilt-or-innocence trial, such as, in Estelle, the Fifth Amendment right against self-incrimination]. Also, "[T]hese fundamental principles of procedural fairness apply with no less force at the penalty phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14 at 16 (1978).

II.

THE TENNESSEE SUPREME COURT, BY ITS ARBITRARY AND CAPRICIOUS APPLICATION OF STATE LAW, BASED ENTIRELY UPON A "FACTUAL" DISTINCTION WHICH IS DEMONSTRABLY NOT PRESENT IN THE RECORD AND IS IN FACT AFFIRMATIVELY REFUTED BY THE RECORD, HAS VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THE CONDUCT OF HIS APPEAL.

A. The Opinion Below

The relevant Tennessee law with respect to the issue presented by the petitioner is found in Smith v. State, 587 S.W.2d 659 (Tenn. 1978), as admitted and cited by the Tennessee Supreme Court in its opinion in this case. The Smith opinion provides as follows:

> We granted the writ of certiorari to examine the advisability of extending to criminal cases the admission of a declaration against penal interest, as an exception to the hearsay evidence rule.
>
> * * *
>
> We adopt the threshold test articulated by the Supreme Court of Minnesota, to wit, that hearsay declarations against penal interest made by an unavailable declarant, to be admissible, must be proven trustworthy by independent corroborative evidence that bespeaks reliability.
>
> (587 S.W.2d at 659, 661)

In the petitioner's case the Tennessee Supreme Court ruled as follows:

> Appellant also insists that the trial judge, having excused Strouth from testifying erred in excluding testimony of Miss Davis relative to her conversations with Strouth. This court has recognized in principle that declarations against penal interest, made by an unavailable declarant, are admissible in criminal cases where the declarations are proven trustworthy by independent corroborative evidence that bespeaks reliability. Smith v. State, 587 S.W.2d 659, 661 (1979). But, appellant did not seek to have Miss Davis testify as to statements made by Strouth, but sought to have her testify as to impressions she formed from conversations she had had with Strouth. These impressions do not come within the exception carved out of the hearsay exclusion rule to permit the introduction of declarations against penal interest, and the trial judge properly excluded such testimony.
>
> State v. Dicks, 615 S.W.2d 126 at 129. (Emphasis supplied).

It should be noted that under the rule of Smith v. State, supra, all relevant statements against penal interest by an unavailable declarant which meet the trustworthiness requirement must be admitted in evidence. Since the testimony offered on behalf of petitioner herein could in no logical way be found to lack the requisite indicia of trustworthiness (where the testimony is from the codefendant's girlfriend, who was coerced by the state into giving the identical testimony at the codefendant's prior trial, where a capital sentence was based upon it);[15] since the statements at issue could not be construed as being other than "against penal interest," inasmuch as in context each clearly implicates the codefendant in the physical act of murder as well as robbery; and since (as illustrated at length in Section C of the Statement, supra, pp. 11-18) it is inconceivable that the exclusion of such evidence could ever be, on the facts of this case, harmless error (particularly in a death penalty case), nothing short of a literal denial of the very existence of any such statements in the record could prevent petitioner from receiving a new trial on the merits under Tennessee law.

The Tennessee Supreme Court did indeed deny the existence of any such statements in the record (though at two other parts of the court's opinion it refers to "statements by Strouth" as if these were found in the record). (615 S.W.2d 126 at 128).

Petitioner concedes the almost unbridled discretion possessed by a state supreme court to interpret state law in any way it sees fit. Nevertheless, petitioner contends that the due process clause requires that the court's decision may not apply individual distinctions in such an irrational manner as to deny a criminal defendant fundamental fairness in his appeal.

The testimony of Barbara Davis simply cannot by any stretch of the rational mind be said to consist solely of "impressions she formed from conversations she had had with Strouth", but instead contains several specific statements by the codefendant to the witness. As indicated above, under the ruling of Smith v. State, supra, which the Tennessee Supreme Court admitted was applicable to the petitioner, if even one such material statement against

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[15] See, Statement, supra, p. 15

penal interest exists, it must be allowed into evidence and therefore petitioner is clearly entitled under Tennessee law to a new trial on the question of guilt or innocence in his capital case, which has been arbitrarily and irrationally denied to him upon the basis of a factual distinction totally absent from and unsupported by the record.

B. The Statements

These statements and their particular relevancy were addressed on pages 10-11 of the Statement of this petition, supra. Ms. Davis testified as follows concerning conversations she had had with the codefendant Strouth about the crime in question:

Q: Go ahead.

A: There's some things that he --- after we got back to our trailer, that he did say to me.

THE COURT: That he what?

A: That he said to me at our trailer.

THE COURT: All right. What did he say?

A: Okay. When I asked him what Jeff's part in this was, it was a few days before he got arrested, he just --- I said what was Jeff's part, and he just like, "ah, Jeff".

THE COURT: Like what?

A: He was putting Jeff down.

THE COURT: What did he say?

A: He said he only gave him twenty-five dollars ($25.00), and he said that he hit the man and the man went down.

THE COURT: Said who hit the man?

A: Chief was talking about himself.

(Tr. 1218)

Petitioner submits that no one could look at the above testimony and state, with the Tennessee Supreme Court, that petitioner "did not seek to have Miss Davis testify as to statements made by Strouth, but sought to have her testify as to impressions she formed...." The fact that she voluntarily offered her assessment of the tone of their conversations ("[Strouth] sounded like he was taking responsibility for the whole thing," [Tr. 1221] and

other such statements) in no way repudiates the fact that this record contains the testimony of Ms. Davis as to specific statements made by Strouth to her and offered by petitioner in a jury-out hearing. These were flatly excluded by the trial court strictly on the basis of their nature as hearsay,[16] contrary to the subsequent rule of Smith v. State, supra. The Smith rule was admitted to be applicable to petitioner by the Tennessee Supreme Court.

As indicated above, only one such statement would be sufficient under Smith to demand that petitioner receive a new trial (absent a showing of harmless error, impossible here). "[Strouth] said he hit the man and the man went down....talking about himself" (in the clear context of answering questions about the robbery and murder at issue).[17] Is there any rational way in which this can be interpreted as being an "impression" instead of a statement by Strouth to the witness? How? Petitioner remains baffled by this ruling, for it passes beyond the merely arbitrary and capricious to the literally irrational. Is the state's highest court permitted such leeway by the Fourteenth Amendment that it may ignore at a whim the most fundamental realities of the English language in its autonomous and ungoverned interpretation of its own evidentiary law?

"[Strouth] said he only gave [Jeff Dicks] $25.00...." (implicitly, and in context, from the proceeds of the robbery).[18] Again, is there any rational way to distinguish this from a "statement,"or anything about it which can fairly be characterized as an "impression" as opposed to a "statement"? And if not, how can petitioner be said to have received his right to an appeal which comports with the fundamental fairness requirements of the Fourteenth Amendment?

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[16]The rulings by the trial court clearly admit the presence of statements by Strouth to Ms. Davis and expressly exclude them as hearsay, not impressions. See Tr. 1221, quoted at p. 20, supra; Tr. 1227 and Tr. 1233, quoted at p. 22, supra.

[17]The particular significance of this statement within the context of the undisputed proof in this case is discussed at length in Statement, Section C, supra at pp. 12-13.

[18]The significance of this particular statement to petitioner's case is discussed at length at ftnt. 6, p. 14, supra.

In light of the undeniable existence of the above declarations against penal interest in this record, debate on the remaining statements by Strouth would simply be moot. One truly material declaration against interest, admissible under Smith, would be sufficient to mandate a new trial; who could read the state's argument concerning the inevitable certainty that since Strouth used the knife the petitioner must have wielded the rock on the victim (quoted at p. 16, supra) and then deny that Strouth's admission that he hit the victim and knocked him down is "material."

C. The Federal Question

The right to appeal from a criminal conviction is not required by due process. McKane v. Durston, 153 U.S. 684 (1895). But when an appeal is provided, it must meet the requirements of due process and equal protection. Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951). Where appellate review has now become an integral part of the state trial system for finally adjudicating the guilt or innocence of a defendant, at all stages of the proceedings the defendant is consequently protected from invidious discrimination by the Fourteenth Amendment. Griffin v. Illinois, 351 U.S. 12 (1956), and cases cited therein. (Emphasis supplied). That is precisely what has happened here!

Petitioner submits that where the actions of the State Supreme Court in applying state law are patently arbitrary and capricious, treating the appellant-defendant in a manifestly unequal and unfair way, and with no rational basis for the factual distinction articulated as to that defendant by the court, then the defendant's due process right to fundamental fairness in appellate review as "an integral part of the [state] trial system for finally adjudicating the guilt or innocence of a defendant... [protected] at all stages of the proceeding [by the Fourteenth Amendment]" (Griffin v. Illinois, supra, 351 U.S. at 18) (emphasis supplied) have been fundamentally violated and must be vindicated in and by this Court.

The law of Smith v. State is on its face the law which must be applied to petitioner's case, as openly admitted by the court's opinion. The distinction applied by the court to distinguish the petitioner's case from the law of Smith is irrational, in that the factual basis relied upon by the court for this interpretation is demonstrably belied and even affirmatively refuted by the record; yet this illusory "fact" has served to "justify" the court in denying to the petitioner — in a capital case — the protection of the law of Tennessee to which he is entitled.

Petitioner would in passing submit that this arbitrary application of law by the Tennessee Supreme Court has effectively served to deny him the effective assistance of counsel; the application of counsel's judgment to the facts of his case and the interpretation of applicable law is rendered meaningless where an appellate court is free to distinguish his case from the applicable law on the basis of a "fact" openly contradicted by the record. There is no amount of preparation and no degree of skill or judgment which can effectively assist a criminal defendant to refute the charges against him when the law of the state may be applied as irrationally as this. Cf. Entsminger v. Iowa, 386 U.S. 748 (1967); Anders v. California, 386 U.S. 738 (1967).

This case does not raise the more difficult question of the propriety of this Court's interfering with the actual interpretation of state law by a state court; the question in this case is whether a state court may arbitrarily redefine words in common usage and thereby rely upon a "fact" that is refuted by the record to distinguish a defendant in a capital case from the admittedly applicable state law, which on its face would otherwise compel for him a new trial.

Petitioner submits that this is a constitutional question of great magnitude which arrives before this Court in the present case in a factual pattern of rare clarity. The Tennessee Supreme Court, in reviewing the petitioner's conviction and sentence of death, has distinguished the petitioner's case from the admittedly

applicable state law by an arbitrary and illusory distinction, based upon a "fact" that the record blatantly contradicts. Does the Fourteenth Amendment guarantee any meaningful protection from otherwise unchecked arbitrary capriciousness arising in the state appellate process? This is an issue which this Court should address.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONALITY OF A STATE'S INFLICTING THE DEATH PENALTY UPON A CODEFENDANT IN A FELONY MURDER CASE WITHOUT REQUIRING ANY FINDING THAT THE DEFENDANT ENGAGED IN CONDUCT WITH THE CONSCIOUS PURPOSE OF PRODUCING DEATH.

A. Prior Decisions Of This Court

In Lockett v. Ohio, 438 U.S. 586 (1978), and in Bell v. Ohio, 438 U.S. 637 (1978), this Court specifically reserved this issue for future decision by determining the Ohio death penalty statute unconstitutional on other grounds. (438 U.S. 586 at 609, ftnt. 16; 438 U.S. 637 at 642, ftnt.).

Mr. Justice White, however, expressly affirmed that he "would hold that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death" (438 U.S. 586 at 628), as argued by the petitioner in each of those cases and by the petitioner herein. Mr. Justice Marshall and Mr. Justice Brennan have consistently expressed their belief that the death penalty in any proceeding is unconstitutional.

Thus, three members of this Court have already indicated in the strongest possible terms that they would hold for the petitioner on this issue.

Mr. Justice Blackmun, though noting that the "Ohio capital penalty statute, together with that State's aiding-and-abetting statute, and its statutory definition of "purposefulness" as including reckless endangerment, allow for a particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of an armed robbery in the course of which a person is killed, even though accidentally" (438 U.S. 586 at 613), nevertheless indicated significant disagreement with Justice White's requirement of "actual intent to kill, in order to be capitally sentenced" (438 U.S. 586 at 614, ftnt. 2) and stated that "[t]he more manageable alternative, in my view, is to follow a proceduralist tack, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion

to consider the degree of the defendant's participation...." (438 U.S. 586 at 615). There is no contention in this case that Tennessee does not allow consideration of any mitigating circumstance.

Mr. Justice Rehnquist, in dissent, overruled all of the petitioner's claims in Lockett and Bell and expressly rejected "the proposition urged by my Brother White in his separate opinion.... I know of no principle embodied in [the Eighth and Fourteenth Amendments], other than perhaps one's personal notion of what is fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon [the petitioner] unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim." (438 U.S. 586 at 635).

Chief Justice Burger, and Justices Stewart, Powell, and Stevens, concurred in holding that in view of the reversals granted to Lockett and Bell, the Court need not address the issue at that time (438 U.S. 586 at 609, ftnt. 16; 438 U.S. 637 at 642, ftnt.).

In view of this wide range of articulated opinion on the Court itself, with an undecided (or at least unexpressed) plurality, and in light of the extreme gravity of the question, it would appear to be literally indisputable that this is an issue whose time is ripe.

In Gregg v. Georgia, 428 U.S. 153 (1976), the prevailing opinion considered "whether the punishment of death is disproportionate in relation to the crime for which it is imposed" and concluded that where the crime is "murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportaionate to the crime" (emphasis added) (428 U.S. 153 at 187). Subsequently, in Coker v. Georgia, 433 U.S. 584 (1977), the Court ruled that the death penalty may not be applied for the crime of rape (where the victim was not killed) under the Eighth Amendment, inasmuch as the penalty was disproportionate to the crime. The logic of the ruling in Coker would appear to apply to any felony where life is not taken. [See, Eberheart v. Georgia, 433 U.S. 917 (1977)(per curiam), vacating two death sentences for convictions on separate counts of rape and kidnapping.]

The defendant sentenced to die for a felony murder committed without his consent by his confederate has been subjected to that singularly ultimate and irrevocable punishment without a finding of personal culpability any greater than that of the defendant in Coker. Simple participation in the underlying felony (plus separate proof of related death) constitutes the extent of the State's finding against the defendant (as illustrated at length by analysis of the requirements of the Tennessee statutes, Section C, infra); if the defendant may not be put to death for the felony itself, by what logic may he constitutionally be condemned to die because someone else committed an insane or brutal or heinous act at the time of the felony? The difference between such a defendant and an accomplice defendant in a simple robbery prosecution is — to each of these individuals — mere fortuity. Chance alone — the chance taken every day by partners in anything, that one's associate is stable and reliable and will not of himself bring both to grief — determines the fact that one defendant receives a limited term of years of imprisonment while the other ceases to exist altogether, at the hands of the State. This "strict liability" theory of guilt by association (apparently based on the theory that anyone who would associate with such a person as the actual murderer is strictly liable for not having foreseen that in the innermost workings of his confederate's heart there lurked a killer) cannot reasonably be thought to deter the crime for which the punishment is inflicted (murder), for the defendant in such a case never committed nor indeed even intended an act of murder. It did not happen because of him, it just happened. How then, it must be asked, can such a penalty prevent such actions by others in the future, when the class of defendants at issue consists only of those who will never have intended to take life and who will never have actually taken a life, in short, people who had no control over the events of the murder itself. When this is considered in conjunction with the fact that such cases cannot be said reasonably to produce such "moral outrage" that "the only adequate response may be the penalty of death" (Gregg v. Georgia, supra, 428 U.S. 153 at

183, 184);[19] it is illogical to assert any position other than that the execution of such murderers-by-legal-fiction is "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, supra, 428 U.S. 153 at 183.

Such punishment by the State of Tennessee is so "grossly out of proportion to the severity of the crime" that it cannot "accord with 'the dignity of man,' which is the basic concept underlying the Eighth Amendment." (Gregg v. Georgia, supra, 428 U.S. 153 at 173).

B. The Tennessee Death Penalty Statute As Applied

Tennessee follows the standard common law felony murder rule, as follows:

> When [the individual] thus entered upon a common design to commit a felony, the natural and probably consequences of which involved the contingency of taking human life, all were responsible for the acts of each committed in furtherance of such design even though the killing was not specifically contemplated.
>
> Dupes v. State, 209 Tenn. 506, 354 S.W.2d 453 (1962), and cases cited therein.

The trial court specifically charged the jury in such terms:

> It is the law of this State that where a common design or plan to commit a felony is entered upon, the natural and probable consequences of which involve the contingency of taking human life, then all persons entering upon the design or plan are responsible for the acts of each when said acts are committed in furtherance of such design or plan even though a resultant killing was not specifically contemplated.
>
> (Emphasis supplied). (Tr. 1311).

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[19] See the opinion of Mr. Justice White in Lockett, noting that "[a]ccording to the factual submissions before this Court, out of 363 reported executions for homicide since 1954, for which facts are available, only eight clearly involved individuals who did not personally commit the murder. Moreover, at least some of these eight executions involved individuals who intended to cause the death of the victim. Furthermore, the last such execution occurred in 1955. In contrast, there have been 72 executions for rape in the United States since 1954." (438 U.S. 586 at 624-5). In the light of Coker v. Georgia, supra, petitioner submits that these statistics alone compel a consideration of this issue by this nation's highest court.

The district attorney specifically argued this theory to the jury:

> ...and here I submit to you that the law, under the law of this State, that an aider and abetter is equally guilty as the principal, so, if you find that Jeffrey Dicks and Donald Strouth were acting in concert or together to commit this armed robbery which resulted in the death of Jimmy Keegan, then the act of each one is attributable to the other. The law doesn't require that Jeffrey Stuart Dicks actually put the slash from ear to ear an inch and a half deep. But he is responsible for it every bit as much as the other man, as he was aiding and abetting, present aiding and abetting, or willing to aid and abet in the commission of this crime. The evidence that has been presented in this case is against both of them. You heard testimony about Strouth's past, and about his activities, and about the fact that he had hawkbill knife. Why should we be proving the case that involves him because the act of Dicks aiding and abetting in the commission of this crime, each act is attributive to the other, and they are each responsible for it.
>
> (Tr. 1293).

Thus the defendant was clearly required only to have participated in the felony to be guilty of murder, and the jury was repeatedly so informed.

The Tennessee first degree murder statute, T.C.A. §39-2402 (1980 Supp.) quoted in Constitutional and Statutory Provisions Involved, supra, p. 5 , provides that every murder committed in the perpetration of any of a number of enumerated felonies (including robbery) is a murder in the first degree, punishable by death or life imprisonment.

The Tennessee death penalty statute, T.C.A. §39-2404 (1980 Supp.), also quoted in pertinent part at p.5-7, provides that no death penalty shall be imposed but upon a unanimous finding of one or more of the statutory aggravating circumstances, one of which is that the murder was committed while the defendant was engaged in committing any of the identical list of enumerated felonies as found in the first degree murder statute [T.C.A. §39-2404(i)(7) (1980 Supp.)]; the statute further requires that the jury shall consider any mitigating circumstances [T.C.A. §39-2404(j) (1980 Supp.)] but mandates that should the jury find one aggravating circumstance (or more) beyond a reasonable doubt (which it has obviously already done — by definition — in a felony murder case), unless

the jury affirmatively finds that said circumstance is outweighed by one or more mitigating circumstances, "the sentence shall be death." [T.C.A. §39-2404(f) and (g) (1980 Supp.)] (Emphasis supplied).

Thus, having satisfied the relatively simple task of proving that the defendant agreed under whatever circumstances to join with another in the commission of a felony, during which a death occurred, the State has in one grand gesture literally mandated that he must receive the death penalty (if the jury, as must be presumed, follows the law) unless the jury affirmatively finds a sufficient number of mitigating circumstances of sufficient calibre to outweigh the aggravating circumstance.

It is obvious that nowhere in these proceedings has anyone been required to make a finding that the defendant was physically and actively involved in the murder at issue; in fact no one has been required to determine that he even knowingly consented to his confederate's use of a weapon to rob the victim (the statutes require only simple, not armed, robbery as the triggering felony). Petitioner submits that the failure of the statute to require any finding of personal culpability for the felony murder defendant is unconstitutional in that it is disproportionate, as argued above in Section A, and also in that it creates a significantly increased risk of arbitrary and capricious infliction of the death penalty by jurors who may become so impassioned and offended by the sheer brutality of the crime that they are incapable of restraining themselves from "making a statement" about their feelings concerning the (perhaps violent and "heinous") murder itself. whatever the defendant's lack of personal culpability; where, as here, the codefendants are tried separately, the risk is high that the jury trying the accomplice defendant, having no other outlet for its outrage at a brutal and vicious deed, will be inclined to vent its frustration and anger on the only target in the room and find that such a defendant "assumed the risk" by even becoming involved in the felonious action. The fact that the Tennessee statute on its face permits any juror to "justify" himself in coming to such

a conclusion and simply and lawfully to decide that the murder itself, irrespective of the defendant's minimal involvement, was so "heinous" (see Section D, infra) that the defendant cannot possibly be forgiven for having joined in any part of the felonious undertaking whatsoever, is amply sufficient to compel a finding by this Court that T.C.A §39-2404 (1980 Supp.) is unconstitutional as applied to this defendant for its failure "to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, supra, 428 U.S. 153 at 189: quoted in Godfrey v. Georgia, 446 U.S. 420 at 427.

The State argued in the Tennessee Supreme Court that "[t]he jury was instructed to consider as mitigating circumstances the factual theory presented on appeal. The jury rejected the contention of the defendant that he was merely waiting outside...." (State's brief, p. 57) and pointed out in oral argument that the statute requires consideration of all mitigating factors, including a list of eight among which is found "[t]he defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor." [T.C.A. §39-2404 (j)(5) (1980 Supp.)] However, petitioner insists that this cannot be construed in any way as a "finding" by the jury in which the jury rejected petitioner's theory, as the statute on its face did not require them to do so (or to report any findings as to specific mitigating circumstances) in order to impose the death penalty!

Tennessee Code Annotated § 39-2404(j) (1980 Supp.) does require that the jury consider any mitigating circumstances, but if the aggravating circumstance present by definition in felony murder (plus any other; see Section D, infra) is not found to be outweighed by a sufficient aggragate of mitigating circumstances "the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found." (Emphasis

supplied). [T.C.A. §39-2404(g) (1980 Supp.)] The form to be signed by the jurors includes the requirement of a list of the aggravating circumstances found, but no such list is required for mitigating circumstances — only a bare statement that however many may have been found, they were insufficiently substantial to outweigh the competing aggravating factors.[20] It may only be surmised how the jury felt about this issue. Obviously, no finding has ever been required of or reported by the jury in this case concerning the defendant's personal involvement in the murder or intent to cause death.

C. The Tennessee Supreme Court Opinion

The Tennessee Supreme Court, in addressing this issue, stated that:

> ...if the evidence in this case showed that appellant merely accompanied Strouth to the Budget Shop and waited outside in the get-away automobile as insisted by appellant, we would give serious consideration to holding, as did Justice White in Lockett v. Ohio, 438 U.S. 621, 98 S.Ct. 2981, 57 L.Ed.2d 1000 (1978), "that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death...."
>
> (615 S.W.2d 126 at 130).

The Court, however, evaded the question by finding that there was evidence which would support a jury's finding that:

> ...appellant's activities exceeded the mere accompanying of Strouth and driving the get-away automobile. After the robbery and murder, two sets of footprints were found outside the rear entrance of the Budget Shop. Both sets of footprints were spaced so that they clearly indicated the persons making the prints "were running" as they left the shop. At the approximate time of the robbery and homicide, appellant and Strouth were observed on the roadway near themouth of the alley leading from the Budget Shop running toward the home of the appellant. Immediately on reaching his home, appellant collected his girlfriend and left Kingsport, taking no possessions with him. Further, appellant admits taking a "few dollars" from the robbery proceeds and used them in getting away from Kingsport.

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[20] Here, the district attorney argued at great length about murder during a felony being punishable by death in order to punish criminals for eliminating the witnesses to their deeds, as well as to deter others. A portion of this language is quoted in the Statement, p. 17.

> We think a jury reasonably could find from this evidence that appellant was an active participant in the robbery and the murder of Mr. Keegan and not, as appellant claimed, waiting for Strouth in an automobile.
>
> (615 S.W.2d 126 at 130).

Petitioner insists that the opinion of the Tennessee Supreme Court is clearly erroneous in asserting that this issue may in effect be rendered moot by the simple existence, in a voluminous record, of a very few bits of circumstantial evidence which "could" arguably justify finding active participation by the defendant.[21] The essential difficulty is starkly indicated by the use, by the court itself, of the word "could", because examination of the statutes (supra, Section B) has clearly revealed that no jury or other fact-finder has ever been required to make any determination that tush was the case. In Presnell v. Georgia, 439 U.S. 14 (1978), this Court held that the Georgia Supreme Court could not uphold the death penalty by asserting (in the absence of a vlid jury finding with regard to a statutory aggravating circumstance, necessary to the imposition of the death penalty) the fact that the Court found "evidence in the record support[ing] the conclusion that petitioner was guilty of [the offense which established the missing element of the statutory aggravating circumstance].... These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phas of any criminal trial." (439) U.S. 15 at 15-16). (It should be noted that the three dissenting justices in Presnell all agreed with the above principle, dissenting on the basis that the state court opinion was so ambiguous regarding its state law rulings as to demand clarification before a decision could be rendered.) (439 U.S. 14 at 18).

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[21] Cf. the Opinion of Mr. Justice White in Lockett, supra at 627: "Of course, the facts of both of these cases might well permit the inference that the petitioners did in fact intend the death of the victims. But there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death and deciding whether to infer that he acted with a purpose of take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done.

Petitioner submits that should this Court determine, as petitioner asserts, "that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death," (Lockett v. Ohio, opinion of White, J., 438 U.S. 586 at 628), oreven a more limited principle, that the state in common law felony murder cases may not rely upon the fact that "[t]he murder was committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit, [a felony]...." [T.C.A. §39-2404 (1980 Supp.)] as an aggravating circumstance justifying by itself the imposition of the death penalty without a finding by the sentencing body that the defendant was physically involved in the actions which resulted in death or affirmatively consent to them (cf. Lockett v. Ohio, opinion of Blackmun, J., 438 U.S. 586 at 614, ftnt. 2), then it is irrefutable that the actions of the Tennessee Supreme Court in avoiding this issue by finding the existence of circumstantial evidence which "could" justify such a finding by the jury are for all rational and constitutional purposes identical with and indistinguishable from the state actions overruled in Presnell, supra.

In any event, the Tennessee Supreme Court's perusal of the record does not serve as a substitute for an official finding by the sentencing jury. See Godfrey v. Georgia, 446 U.S. 420 at 429 (1980).

D. The Additional Aggravating Circumstances

The State may also seek to moot this issue by arguing that a second aggravating circumstance was found by the jury against this defendant, but petitioner insists that under the facts of this case this second finding is clearly unconstitutional. The jury did find that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind" [T.C.A. §39-2404(i)(5) (1980 Supp.)], but petitioner submits that such a finding can in no way obviate the issue before this Court, since on its face this statutory aggravating circumstance requires only

that the murder have been heinous, atrocious, depraved, et al., and nowhere requires that the defendant's own actions have been so. This provision of the statute is constitutionally disproportionate where it is applied to a defendant who has not been found to have participated in the heinous, atrocious, or cruel acts himself --if the depravity of mind at issue is not the defendant's, what possible relevance does it have to whether he should live or die? That this aggravating circumstance is also unconstitutionally vague at the very least as applied to this defendant[22] is made clear by Godfrey v. Georgia, 446 U.S. 420 (1980), for if the very similar statutory provision thereinwas unconstitutional as applied to the deliberate "coldblooded excutioner's style" acts of Godfrey (446 U.S. 420 at 444, White, J., dissenting), how much more so are they forbidden as applied to a defendant who has never been found by a jury (or for that matter been proven by the State) to have been within the scene of the crime when the murder at issue took place.

E. Conclusion

Petitioner submits that the past decisions of this Court as well as common sense compel that the interaction of common law and statutory felony murder, the death penalty, and the Eighth Amendment be addressed by the nation's highest Court, both to "minimize the risk to wholly arbitrary and capricious action" and to confront the questionof whether death may be inflicted "without a finding that the defendant engaged in conduct with the conscious purpose of producing death." Petitioner asserts that the above analysis of T.C.A. §39-2404 (1980 Supp.) clearly manifests that no such finding has ever been required by any factfinder by the State of Tennessee with respect to him, that his lackof any intent to participate in such actions was clearly and substantially asserted at trial, and that this case is therefore a suitable vehicle through which this issue may be and should come before this Court.

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[22]Under the holding of Godfrey v. Georgia, supra, it would perhaps be arguable that this statutory aggravating circumstance would be unconstitutionally vague even as applied to Strouth, the perpetrator of the murder in this case.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED
FEB 2 1981
JOHN A. PARKER, Clerk
By_____

STATE OF TENNESSEE,
APPELLEE

VS.

JEFFREY STUART DICKS,
APPELLANT

GREENE CRIMINAL

HONORABLE EDGAR P. CLAHOUN, J.
SITTING BY INTERCHANGE

DOCKET NUMBER 12

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AFFIRMED

COOPER, JUSTICE

Exh. "A"

O P I N I O N

This case is before us pursuant to T.C.A. § 39-2406, which provides for review by this court of every case in which a death penalty is imposed.

Appellant, Jeffrey Stuart Dicks, was found guilty of murder in the first degree for the killing of James Keegan in the course of the robbery of the Budget Shop in Kingsport, Tennessee. The Budget Shop is a second-hand clothing store. Mr. Keegan, the owner, was known to carry a substantial sum of money on his person to be used in the business. On February 16, 1978, Mr. Keegan's body was found on the floor of his place of business. His throat had been cut and there was evidence of a severe blow to his head. Death was due to the throat wound which, according to medical testimony, was inflicted while Mr. Keegan was unconscious from the head injury. A search of Mr. Keegan's person and his business establishment revealed that Mr. Keegan's money had been taken. Appellant and Donald Wayne "Chief" Strouth subsequently were arrested and indicted on a charge of murder in the first degree (murder in the perpetration of a robbery.) The defendants were tried separately, to avoid the possibility of a Bruton[1] violation inherent in the fact that each of the defendants had given investigating officers a statement implicating the other. Appellant also was granted a change of venue from Sullivan County, where the crime

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[1] Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed.2d 476 (1968).

was committed, to Greene County. On trial, appellant was found guilty of murder in the first degree. In a subsequent hearing to determine the sentence to be imposed on the defendant, the jury found the following statutory aggravating circumstances:

> The murder was especially heinous, atrocious or cruel in that it involved torture and depravity of mind; and
>
> The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing or placing of a destructive device or bomb."

The jury also found that "there [were] no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances," and sentenced appellant to death.

Appellant does not specifically question the sufficiency of the convicting evidence. He does question rulings by the trial judge on the admissibility of evidence in the guilt-determination phase of the trial, evidently on the bases that photographic evidence admitted tended to inflame the jury, and that statements by Donald Strouth and testimony of a psychologist, which were excluded, tended to show that appellant did no more than accompany the killer of James Keegan. Appellant also insists (1) that the sentencing to death of a defendant who did no more than "accompany the killer on the underlying felony" is grossly disproportionate to the defendant's moral guilt and is cruel and inhuman punishment, and (2) that sections of T.C.A. § 39-2404, dealing with punishment for

first degree murder, are unconstitutional.

The photographic evidence admitted over the objection of the appellant consisted of "before and after" photographs of Mr. Keegan, and a photograph of the defendant. Appellant insists the photographs of Mr. Keegan created a vivid picture of life and death for the jury, were without evidentiary value, and were clearly prejudicial. We find no prejudicial error in the admission of the photographs, though it would have been better had the "before" picture of Mr. Keegan been excluded since it added little or nothing to the sum total of knowledge of the jury. The other two pictures, however, were relevant to material issues in the trial and were not inflammatory. The picture of Mr. Keegan taken at the scene of the homicide, and which does not show the neck wound, was a necessary predicate to proof that Mr. Keegan was unconscious at the time his throat was cut. The physician, who so testified, did so partly on the photographic evidence showing the position of Mr. Keegan's body and the absence of blood on Mr. Keegan's hand as shown in the photograph, and partly on the description of the wound.

The photograph of the defendant was relevant to the issue of identification. Barry Willis identified the coat shown in the photograph as the one appellant was wearing when he was seen by Willis on February 14, 1978, in the vicinity of the Budget Shop. Further, there was evidence that relatives of appellant had burned a long, green coat in the "dead of night," after police officers had come to their home seeking information concerning the

appellant. It was the coat shown in the picture and the coat appellant admittedly was wearing at the time of the homicide.

Appellant sought to call Donald Strouth as a witness in his behalf. When the trial judge excused Strouth from testifying, appellant sought to have admitted into evidence, through Barbara Davis, statements by Strouth which appellant contends were against penal interest. These statements were excluded by a ruling of the trial judge in a jury-out hearing. These rulings by the trial judge are assigned as error.

Appellant insists the trial judge erred in not forcing Strouth to testify or, at least, forcing him to claim his Fifth Amendment privilege in the presence of the jury. At the time of appellant's trial, Strouth stood convicted of the robbery and murder of James Keegan and was under a sentence of death. His case was on appeal to this court. In a jury-out hearing, the trial judge determined that Strouth had not testified in his own trial, and was going to exercise his Fifth Amendment privilege not to testify in appellant's trial. As a consequence, the trial judge excused Strouth from taking the stand. We see no basic error in the trial judge's action.

The calling of a witness who will refuse to testify does not fill the purpose of compulsory process, which is to produce testimony for the defendant. United States v. Roberts, 503 F. 2d 598, 600 (9th Cir. 1974). But if it did, where there is a conflict between the basic

right of a defendant to compulsory process and the witness's right against self-incrimination, as in this case, the right against self-incrimination is the stronger and paramount right. Frazier v. State, 566 S.W.2d 545, 551 (Tenn. Crim. App. 1978). See United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); United States v. Wyler, 487 F.2d 170 (2nd Cir. 1973); United States v. Beye, 445 F.2d 1037 (9th Cir. 1971). Further, a jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege against self-incrimination, whether those inferences be favorable to the prosecution or the defense. Bowles v. United States, 439 F.2d 536, 541 (D.C. Cir. 1970). See also United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973), wherein the court points out that:

> If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has a right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.

The court also noted in Johnson that the cases saying it was not always reversible error to call such a witness to the stand fall short of establishing that the practice is either desirable or mandatory. 488 F.2d at 1211 n. 5. See generally Annot., 86 A.L.R.2d 1443 (1962).

Appellant also insists that the trial judge, having excused Strouth from testifying, erred in excluding testimony of Miss Davis relative to her conversations with Strouth. This court has recognized in principle that

declarations against penal interest, made by an unavailable declarant, are admissible in criminal cases where the declarations are proven trustworthy by independent corroborative evidence that bespeaks reliability. Smith v. State, 587 S.W.2d 659, 661 (1979). But, appellant did not seek to have Miss Davis testify as to statements made by Strouth, but sought to have her testify as to impressions she formed from conversations she had had with Strouth. These impressions do not come within the exception carved out of the hearsay exclusion rule to permit the introduction of declarations against penal interest, and the trial judge properly excluded such testimony.

Appellant also insists the trial judge erred in refusing to allow Dr. David McMillan, a clinical psychologist, to testify in the first phase, the guilt and innocence phase, of the trial. Dr. McMillan had administered a battery of tests including the Wexler Adult Intelligence Scale, Gender Gestalt Test, Rorschák Ink Blot Test, Thematic A Perception Test, Incomplete Sentence Blank and the Minnesota Multiphasic Personality Inventory. From these tests, Dr. McMillan proposed to testify that appellant "is a weak, moody, fearful person, and is a follower instead of a leader." No contention was made in behalf of appellant, nor could Dr. McMillan testify, that appellant was insane or incompetent under the test set forth in Graham v. State, 547 S.W.2d 531 (Tenn. 1977). The trial judge concluded this evidence would be admissible in the punishment phase of the trial, being relevant to mitigating circumstances, but that it was not related to any issue in the guilt-determination phase of the trial. We see no error in these

rulings.

Appellant insists that the sentencing to death of a defendant who did no more than "accompany the killer on the underlying felony" is grossly disproportionate to the defendants moral guilt and is cruel and inhuman punishment. "Felony murder" can be the aggravating circumstance which justifies the imposition of the death penalty. See Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); Jurek v. Texas, 428 U.S. 262, 268, 96 S.Ct. 2950, 2955, 49 L.Ed.2d 929 (1976); Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979). However, if the evidence in this case showed that appellant merely accompanied Strouth to the Budget Shop and waited outside in the get-away automobile as insisted by appellant, we would give serious consideration to holding, as did Justice White in Lockett v. Ohio, 438 U.S. 621, 98 S.Ct. 2981, 57 L.Ed.2d 1000 (1978), "that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death. . . ." 98 S.Ct. at 2985. But the evidence indicates that appellant's activities exceeded the mere accompanying of Strouth and driving of the get-away automobile. After the robbery and murder, two sets of footprints were found outside the rear entrance of the Budget Shop. Both sets of footprints were spaced so that they clearly indicated the persons making the prints "were running" as they left the shop. At the approximate time of the robbery and homicide, appellant and Strouth were observed on the roadway near the mouth of the alley leading from

the Budget Shop running toward the home of appellant. Immediately on reaching his home, appellant collected his girlfriend and left Kingsport, taking no possessions with him. Further, appellant admits taking a "few" dollars from the robbery proceeds and used them in getting away from Kingsport. We think a jury reasonably could find from this evidence that appellant was an active participant in the robbery and murder of Mr. Keegan and was not, as appellant claimed, waiting for Strouth in an automobile.

In the remaining assignment of error, appellant insists that T.C.A. § 39-2404 (g)[2] is unconstitutional in that it "creates the presumption of death if one or more aggravating circumstances are proved, creating an unlawful shift in the burden of proof to the defendant." T.C.A. § 39-3404 (g) is also attacked on the ground it makes death mandatory under certain conditions and does not allow the jury the opportunity to show mercy. Appellant also insists that T.C.A. §39-2404 (i)(5)--one of the aggravating circumstances found by the jury--is unconstitutionally vague and overbroad. We see no merit in either insistence.

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[2] If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court . . . .

In this state, a trial on a charge of first degree murder is a bifurcated proceeding, with the jury first determining the defendant's guilt or innocence of the charge. Where it is found that the defendant is guilty of first degree murder, a second proceeding is held before the same jury to determine the sentence--either life imprisonment or death--to be imposed. T.C.A. § 39-2404 (a). The jury may impose the death penalty only upon finding that one or more aggravating circumstances listed in the statute are present, and further that such circumstance or circumstances are not outweighed by any mitigating circumstance T.C.A. § 39-2404 (g). The burden of proof rests upon the state to establish the aggravating circumstances beyond a reasonable doubt and the jury must specifically find that these outweigh any mitigating circumstances before they are justified in imposing the death penalty. T.C.A. § 39-2404 (f). These separate determinations must be put in writing and given to the trial judge along with the sentence of death, thus assuring that the jury has gone through the correct analysis in arriving at a death sentence. T.C.A. § 39-2404 (g). This direction to the jury by the legislature of this state meets the requirement set forth in Gregg v. Georgia, 428 U.S. 153, 192, 96 S.Ct. 2909, 2934 49 L.Ed. 859 (1976) that a jury be given guidance in determining punishment when the death penalty is a possible punishment.

> Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given[in the sentencing hearing] . . . . It seems clear, however, that the problem

> will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision. Gregg v. Georgia, supra at 192

The procedure described above is the suggested procedure of the MODEL PENAL CODE § 210.6, Comment 3, at 72 (Tenn. Draft No. 9, 1959), noted with approval by the United States Supreme Court in Jurek v. Texas, 428 U.S. 262, 271 n. 6, 96 S.Ct. 2950, 2956 n. 6, 49 L.Ed.2d 929 (1976). And, it has been held by this court to satisfy the requirements of the Constitution of the United States and the Constitution of Tennessee. See Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied, 101 S.Ct. 251, 66 L. Ed. 2d 117, petition to rehear denied Dec. 15, 1980; Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979).

This procedure was followed in the instant case with the jury finding three aggravating circumstances and no mitigating circumstances.

The argument by appellant that T.C.A. § 39-2404 (g) makes death mandatory under certain circumstances and does not allow the jury the opportunity to show mercy, and as a result is unconstitutional, does not comport with our assessment of the effect of the statute. We pointed out in Houston v. State, supra, that:

> T.C.A. § 39-2404 (i) and (j) set forth the aggravating and mitigating factors to be considered by the jury in the sentencing hearing, with the admonishment that any factor, not just the specified statutory factors, may be considered in mitigation. These circumstances are presented for the jury to consider and "weigh" in exercising its "controlled" discretion in determining what sentence should be imposed. The jury is not required to return a mandatory verdict of death. It must consider mitigating factors. As to the charge that the

> statute is vague because [it allows] the jury to "weigh" aggravating and mitigating circumstances, it must be borne in mind that the weighing of evidence is the normal function of the jury. And, where the jury is given adequate guidance as to what to consider, the requirement that the jury weigh aggravating and mitigating factors shown by the evidence does not make the statute vague and, consequently, unconstitutional. See State v. Pierre, 572 P.2d 1338, 1347-1348 (Utah 1977), cert denied, 99 S.Ct. 219 (1978). (emphasis supplied)

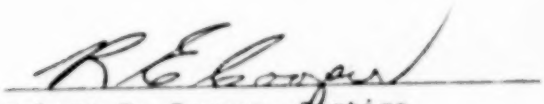
Appellant also urges that T.C.A. § 39-2404 (i) (5), one of the two aggravating circumstances found by the jury, is unconstitutionally vague and overbroad. The section of the statute under attack is as follows:

> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

In Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976), the Supreme Court of the United States considered a similar attack on the constitutionality of an identical aggravating circumstance set forth in the Florida death sentence statutes The Court held that the aggravating circumstance, as construed by the Florida Supreme Court, was not impermissibly vague. The Florida Supreme Court had construed the provision to be directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In Tedder v. State, 322 So.2d 908 (1975) the Florida court recognized that the provision was directed by its legislature at something "especially" heinous, atrocious or cruel, 322 So.2d at 910. The trial court's instructions to the jury in this case are compatible with

these constructions by the Florida court, which we approve. Further, as pointed out by the state in its brief, "the factual circumstances which the jury found in the instant case, the nature of the s'itting of the victim's throat, support such an interpretation."

Having again concluded that the Tennessee Death Penalty Act is constitutional and finding no prejudicial error committed in the trial, the judgment entered in the trial court of death by electrocution is affirmed. The date of the execution is set for July 15, 1981.



Robert E. Cooper, Justice

Concur:
Fones and
Harbison, JJ.

Dissent:
Brock, C.J.

For Publication

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED
FEB 2 1981
JOHN A. PARKER, Clerk
By_____

STATE OF TENNESSEE,

Plaintiff-Appellee,

V.

JEFFREY STUART DICKS,

Defendant-Appellant.

Greene Criminal

Hon. Edgar P. Calhoun
Sitting By Interchange

Docket Number 12

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DISSENTING OPINION

I concur in the affirmance of Dicks' guilt of first degree murder, but I dissent from the sentence of death for the reasons herein set out.

I

Article I, Section 16, of the Constitution of Tennessee provides:

> "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Eighth Amendment to the Constitution of the United States, applied to the states through the Fourteenth Amendment, contains a like prohibition.

Although this Court has never declared a statute to be void because it is in violation of the cruel and unusual punishment prohibition of Article I, Section 16, of the Tennessee Constitution, it long ago declared its authority and power to do so. In Brinkley v. State, 125 Tenn. 371, 143 S.W. 1120 (1911), the Court stated:

> "However, we think that the profession generally understands, and the clear weight of modern authority is, that the courts have such power under section 16 of the Bill of Rights, and in a proper case presenting the question, it would be their undoubted duty to do so."
>
> 125 Tenn. at 382-83, 143 S.W.2d at 1122.

Moreover, we are not bound to construe a provision of our own state constitution in the same way and to the same effect as the United States Supreme Court has construed a like provision of the federal constitution. A majority of this Court expressly so held in Miller v. State, Tenn., 584 S.W.2d 758 (1979). In the Miller case we refused to construe the ex post facto provisions of Article I, Section

11, of the Constitution of Tennessee so as to permit the application to the defendant of a death penalty statute which had been enacted after the commission of the homicide in question, although the Supreme Court of the United States in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), had held that the ex post facto provision of Article I, Section 10, of the Constitution of the United States did not prevent the State of Florida from applying a Florida deatn penalty statute in similar circumstances. Speaking for the Court, Mr. Chief Justice Henry stated:

> "However, as to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we might not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution. It is settled law that the Supreme Court of a state has full and final power to determine the constitutionality of a state statute, procedure, or course of conduct with regard to the state constitution, and this is true even where the state and federal constitutions contain similar or identical provisions. (Citations omitted.) Thus, although state courts cannot interpret their state constitution so as to restrict the protections afforded by the federal constitution, as interpreted by the United States Supreme Court, they may expand protections on the basis of a textually identical state constitutional provision.
>
> * * *
>
> "We do not accept the holding of Dobbert as a matter of Tennessee constitutional law."
>
> 584 S.W.2d at 760.

To the same effect see State v. Kaluna, Hawaii, 520 P.2d 51 (1974).

II

I concurred in the majority opinion in Cozzolino v. State, Tenn., 584 S.W.2d 765 (1979), which contains the following statement:

> "Without detailing the precise scope of the protection afforded by that clause [cruel and unusual punishments clause of Article I, Section 16, of the Constitution of Tennessee], we hold that it places no greater restriction on the punishments that may be imposed by this state than does the federal constitution."
>
> 584 S.W.2d at 767.

In so doing I erred. But, I think it better to confess and correct that error than to perpetuate it.[1] I am unable to agree that the protection provided by the cruel and unusual punishments clause of Article I, Section 16, of the Tennessee Constitution must be reduced to the uncertainties and contradictions contained in the decisions of the United States Supreme Court involving the ddath penalty over the past ten years.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), the Court struck down the death penalt as then applied on the ground that its imposition was capricic and arbitrary and, thus, unconstitutional. Nine separate opinions accompanied the 5 to 4 decision. Justices Brennan and Marshall found the death penalty to be cruel and unusual under all circumstances and, thus, unconstitutional. Justices Douglas, Stewart and White condemned the death penalty because it had been applied discriminatorily, "wantonly, . . . freakishly, . . . and so infrequently that it did not serve any public purpose . . . ." Stewart, J., at 408 U.S. 310.

---

[1] Cozzolino was granted a new sentencing hearing which resulte in his receiving a life imprisonment sentence. I did not participate in the decision of Houston v. State, Tenn., ____ S.W.2d ____ (1980).

Chief Justice Burger and Justices Blackmun, Powell and Rehnquist dissented.

Four years later, the Court held for the first time that a state could inflict the death penalty without violating the Eighth Amendment's prohibition of cruel and unusual punishments. Gregg v. Georgia, 428 U.S. 153 (1976). A controlling plurality of the justices approved death penalty statutes that, in their view, narrowed the class of crimes for which the death penalty would be imposed and guided the discretion of the sentencer.

Since Gregg v. Georgia, supra, however, just how much discretion the jury should be allowed in imposing death as a punishment has been a constant source of difficulty for the legislatures and the courts. On the one hand, notions of equal protection, due process, and fundamental fairness indicate that juries across the country should impose similar punishments for compafable crimes committed by comparable criminals. On the other hand, notions of compassion, individ justice and fairness indicate that it is "[h]ighly relevant - if not essential" that the sentencer consider particular circumstances such as the background and personal characteris of each defendant. Lockett v. Ohio, 438 U.S. 586 (1978) [opinion of Burger, C.J., quoting Williams v. New York, 337 U.S. 241, 247 (1949)]. In my opinion it is impossible to reconcile this tension between consistency (sought to be achieved by guiding the jury's discretion) and individual justice (attempted by allowing the jury to exercise discretion The states' failure to achieve this delicate balance has forced the Supreme Court to overturn a number of death penalty sentences. See, e.g., Woodson v. North Carolina

428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (statutes providing for mandatory death sentence for certain offenses) (too little discretion); Roberts v. Louisiana, 428 U.S. 325 (1976) (statutes providing for mandatory death sentence for certain offenses and for submission of lesser-included offenses not supported by the evidence) (too little discretio in specifying sentence; too much caprice in specifying crime) Lockett v. Ohio, supra (statute listing exclusive mitigating circumstances) (too little discretion); Godfrey v. Georgia, _____ U.S. _____, 100 S.Ct. 1759 (1980) (unconstitutional application of statute listing aggravating circumstances) (to much discretion); Beck v. Alabama, _____ U.S. _____, 100 S.Ct. 2382 (1980) (statute precluding consideration of lesser-included offenses supported by the evidence) (too little discretion). The difficulty in striking a coherent balance between discretion and statutory control was pointed out in Lockett v. Ohio, supra, by Mr. Justice White, who chided the plurality for its "about face" since Furman. 438 U.S. at 622 (White, J., concurring in part, dissenting in part, and concurring in the judgment). And, Chief Justice Burger, reviewing the Court's recent death penalty cases, conceded that "The signals from this Court have not, however, always been easy to decipher." Id. at 602 (opinion of Burger, C.J.).

I am not able to decipher "the signals" of those decisions and, thus, make no prediction whether the current Tennessee death penalty statute, or the infliction of the death penalty in this particular case, can stand muster under the Eighth Amendment as it might be construed by a majority of the Supreme Court.

Our General Assembly has made a good faith,

conscientious effort to write a death penalty statute that complies with recent decisions of the Supreme Court. However, I have reached the settled conclusion that the death penalty violates Article I, Section 16, of the Constitution of Tennessee because it is a "cruel and unusual punishment."

In an opinion by Chief Justice Hennessey, the Supreme Judicial Court of Massachusetts in District Attorney For the Suffolk District v. James Watson, _____ Mass. _____, 411 N.E.2d 1274 (1980), has concluded that the death penalty statute of that state, equivalent to the Tennessee statute in every material respect, is invalid as a cruel or unusual punishment prohibited by Article 26 of Declaration of Rights of the Constitution of Massachusetts because: "(1) the death penalty is unacceptably cruel under contemporary standards of decency, and (2) the death penalty is administered with unconstitutional arbitrariness and discrimination." Id. at 1275. I find the reasoning and conclusions of that opinion to be irrefutable. I believe it will stand as a landmark decision and be followed by the courts of many other jurisdictions in the years to come. I shall refer to it and quote from it extensively in this opinion.

THE DEATH PENALTY IS A CRUEL AND UNUSUAL PUNISHMENT

A. "Cruel and unusual" - the standard.

It must be conceded, of course, that at the time Article I, Section 16, of our state constitution was adopted in 1870 it was not considered to prohibit capital punishment. Capital punishment was employed before its adoption and has been employed since its adoption. But,

as noted by the Supreme Court in Weems v. United States, 217 U.S. 349, 373 (1910), a constitutional provision "is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider applications than the mischief which gave it birth." As noted by the Supreme Court of California in People v. Anderson, 6 Cal.3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972), cert. denied 406 U.S. 958 (1972):

> "The framers of our Constitution like those who drafted the Bill of Rights, anticipated that interpretation of the cruel and unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted."
>
> 493 P.2d at 893.

See also, Trop v. Dulles, 356 U.S. 86, 101 (1958), in which the Supreme Court observed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Therefore, when the validity of the death penalty is drawn in question, judges cannot avoid the task of determining whether the death penalty continues to conform to the "standards of

the age."[2] If it falls below that standard, it is the duty of the court to declare it to be invalid. Ever since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) that has been the way such questions have been decided in this country. The courts have no more authority to defer to the judgment of the legislature in determining what is a "cruel and unusual" punishment than to defer to that branch of government for a determination of what is "due" process of law or what is an "unreasonable" search and seizure. In each of these instances, the determination is a judicial one which, in our jurisprudence, resides with the courts and cannot be avoided.

What considerations enter into a determination whether the death penalty does or does not comply with contemporary moral standards? Clearly, there is not unanimity of public opinion either favoring or opposing the death penalty. However, public opinion, although relevant, is not conclusive of the issue.

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[2] "If we look back at history, we find that capital punishment was once thought to be the only just punishment for thieves, adulteresses, heretics, and forgers. The sentiment of justice went so far as to require the robber to have his bones broken and his still living body left to expire tied to the spokes of a wheel fixed on a pole on a scaffold. We now find such punishments revolting; we use the death penalty only to remove life, and we perform the operation in the seclusion of a prison chamber. The point is that justice is a relative concept that changes with the times. A sense of justice must exist among all people to regulate their living together. This is an immutable requirement of social life, but what justice means is not immutable."

Sellin, "The Inevitable End of Capital Punishment," in Capital Punishment 241-42 (T. Sellin ed. 1967).

> "If the judicial conclusion that a punishment is 'cruel and unusual' 'depend[ed] upon virtually unanimous condemnation of the penalty at issue,' then, '[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.' We know that the Framers did not envision 'so narrow a role for this basic guaranty of human rights.'"
>
> Furman v. Georgia, supra at 268 (1972) (Brennan, J., concurring), quoting from Goldberg & Dershowitz Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1782 (1970).

The Supreme Judicial Court of Massachusetts has correctly pointed out ". . . that what our society does in actuality is a much more compelling indicator of the acceptability of the death penalty than the responses citizens may give upon questioning." Watson, supra, at 1282.

The last person executed in Tennessee was William Tines, on November 7, 1960. There was one execution in 1959 (Thomas Rutledge). There were none in 1958, two in 1957, and none in 1956. There were four in 1955. There were none in 1954, 1953, 1952, or 1951. No executions were carried out in the four recent administrations of Governor Frank Clement, Governor Buford Ellington, Governor Winfield Dunn and Governor Ray Blanton. Reciting a lack of executions in Massachusetts since 1948, Chief Justice Hennessey of the Massachusetts Supreme Judicial Court in District Attorney for the Suffolk District v. Watson, supra, made this statement:

> "The complete absence of executions in the Commonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable."
>
> Id. at 1282.

The above recited experience in Tennessee leads me to a similar conclusion.

I now point out certain aspects of the death penalty which, in my view, render it "cruel and unusual."

B. Finality of the penalty.

The utter finality of the death penalty may cruelly frustrate the cause of justice. Once the prisoner has been put to death by the state there can be no relief granted although later developments in the evidence of the case or of the controlling law may show, conclusively, that the penalty was mistakenly inflicted.[3] Again, I quote from the opinion of the Supreme Judicial Court of Massachusetts in the Watson case:

> "The 'irreversible finality of the execution of a criminal defendant,' [Commonwealth v. O'Neal, 369 Mass. 242, 276 n. 1, 339 N.E.2d 676, 695 n. 1 (1975)] (Wilkins, J., concurring), could frustrate such efforts to see that justice is applied equally when changes in the law occur or when new evidence is discovered. While this court has the power to correct constitutional or other errors retroactively by ordering new trials for capital defendants whose appeals are pending or who have been fortunate enough to obtain stays of execution or commutations, it cannot, of course, raise the dead."
>
> Watson, supra, at 1282.
>
> "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights

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[3] The reality of the danger of convicting and punishing an innocent person is shown by our case, Forbes v. State, Tenn., 559 S.W.2d 318 (1977). Forbes was convicted of rape and served five years of a very long sentence in the penitentiary before he was pardoned recently by Governor Alexander after the police and the prosecuting attorney acknowledged that a mistake had been made and recommended that the Governor pardon Forbes. One shudders to think of the fate of Forbes if rape had been punishable by death.

> to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws."
>
> Furman v. Georgia, supra at 290 (1972) (Brennan, J., concurring).

> "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me."
>
> Thomas Jefferson (quoted in E. Block, And May God Have Mercy . . 1 [1962]).

C. Infliction of Pain Upon The Prisoner.

The death penalty is now unique in its designed infliction of both mental and physical pain upon the prisoner. This was pointed out by Mr. Justice Brennan in Furman v. Georgia, supra, at 287-88, as follows:

> "Since the discontinuance of flogging as a constitutionally permissible punishment, Jackson v. Bishop, 404 F.2d 571 (CA 8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."

See also, People v. Anderson, supra, 6 Cal.3d at 649.

The barbarous nature of the death penalty and especially of the mental cruelty which it inflicts upon the prisoner has been vividly expressed by Justice Liacos of the Massachusetts Supreme Judicial Court, as follows:

"The imposition of the death penalty is disguised by the language and technique of abstraction. 'Inde no one dares speak directly of the ceremony. Officials and journalists who have to talk about it, as if they were aware of both its provocative and its shameful aspects, have made up a sort of ritual language, reduced to stereotyped phrases. Hence we read at breakfast time in a corner of the newspaper that the condemned "has paid his debt to society" or that he has "atoned" or that "at five a.m. justice was done."' A. Camus, Reflection: on the Guillotine, in Resistance, Rebellion, and Death 132 (1960). Consistent with the views of Camus, of authorities cited elsewhere in this opini and of the majority, are the experiences described by Henry Arsenault, a convicted murderer sentenced to death in this Commonwealth. See Arsenault v. Commonwealth, 353 Mass. 575, rev'd 393 U.S. 5 (1968). See also, Commonwealth v. Devlin, 335 Mass. 555 (1957). Arsenault is presently an inmate at the Massachusetts correctional Institution at Norfolk and has submitted a brief pro se as amicus curiae. His brief tells his story.

"For over two years, Henry Arsenault 'lived on death row feeling as if the Court's sentence were slowly being carried out.' Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. 'There was a day to day choking, tremulous fear that quickly became suffocating.' If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. The guard was there when he had his nightmares and there when he wet his pants. Arsenault retained neither priva nor dignity. Apart from the guards he was alone much of the time as the day of his execution neared

"And on the day of the execution, after three sleepless weeks and five days' inability to eat, after a night's pacing the cell, he heard the warde explain the policy of the Commonwealth - no visitor: no special last meal, and no medication. Arsenaul asked the warden to let him walk to the execution on his own. The time came. He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that the execution would not b for over an hour. Arsenault sat on the other side of the room as the witnesses filed in behind the one-way mirror. When the executioner tested the chair, the lights dimmed. Arsenault heard other prisoners scream. After the chaplain gave him last rites, Arsenault heard the door slam

shut and the noise echoing, the clock ticking. He wet his pants. Less than half an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably. A doctor sedated him. And he was moved off death row.

". . . The raw terror and unabating stress that Henry Arsenault experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscien of enlightened government and give the civilized heart no rest.

"Death is the 'king of terrors.' Job 18:14. . . . So deep is the fear of death and the corresponding desire for transcendence that Christian thought attributes death to the fall of Adam, and the New Testament proclaims Christ's victory over death. 1 Corinthians 15:20, 26.

* * *

"The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibilit of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentence to death. The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement."

Watson, supra, at 1289-92 (Liaco J., concurring) (footnotes omitt

In a footnote, Justice Liacos further states,

"My argument that the ordeal imposed on the condemned is cruel and unusual punishment does not depend on the existence of lengthy delays between sentence and execution. Two months -

> or, for that matter, one day - of torture offends the Constitution. As C. Duffy, a former warden of California's prison at San Quentin has described, 'One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.' C. Duffy & A. Hirshberg, 88 Men and 2 Women, 254 (1962)."
>
> Id. at 1291, n. 5 (Liacos, J., concurring).

D. Unnecessary killing is cruel.

Finally, the death penalty is absolutely unnecessary as a punishment and, therefore, is cruel.[4] Society would be adequately protected from the condemned murderer by his permanent imprisonment; killing him is not necessary.

Our law recognizes only one instance in which a deliberate killing is justified, viz., one may kill another in his own or another's necessary self-defense. This being true, how can the whole body of individuals making up "The State" be justified in killing a person when it is unnecessary to do so for the protection of the people of the state? See Capital Punishment, 56 T. Sellin (1967 edition). By any modern concept of the term "cruel," the deliberate and unnecessary killing of a human being is cruel, whether done by an individual or by the State.

> "In society where the force of all is mobilized against one, what principle of justice authorizes it to impose death? . . . A victor who would kill his captured enemies is called barbaric! A man who butchers a child whom he can disarm and punish seems like a monster! An accused condemned by society is like a conquered and powerless enemy; he is weaker before it than a child is before a man."
>
> Robespierre (quoted in Hornum, "Two Debates: France, 1791; England, 1956," in Capital Punishment 65-66 [T. Sellin ed. 1967]).

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[4] "The principle that a severe punishment must not be excessive does not, of course, mean that a severe punishment is constitutional merely because it is necessary. A State could not now, for example, inflict a punishment condemned by history, for any such punishment, no matter how necessary, would be intolerably offensive to human dignity. The point is simply that the unnecessary infliction of suffering is also offensive to human dignity."

Furman v. Georgia, supra, at 281 n. 26 (Brennan, J., concurring).

With respect to the question whether the death penalty is necessary, the Supreme Court of California, in holding that its death penalty statute violated the "cruel or unusual" punishments clause of its state constitution, said in People v. Anderson, supra:

> "The People concede that capital punishment is cruel to the individual involved. They argue, however, that only 'unnecessary' cruelty is constitutionally proscribed, and that if a cruel punishment can be justified it is not forbidden by article I, section 6, of the California Constitution. We need not decide here whether our Constitution permits the infliction of 'necessary' cruelty as punishment for crime, because respondent has not demonstrated that the death penalty can be justified as necessary to any state interest.
>
> "In seeking to justify continuance of capital punishment, the People argue that it furthers three of the four acknowledged purposes of punishment. Respondent concedes that death is in no way rehabilitative, but contends that capital punishment may be legitimately imposed in retribution for serious offenses, that it serves to isolate the offender, and that the existence of the death penalty acts as a deterrent to crime. None of these purposes is shown to justify so onerous a penalty as death.
>
> "Although vengeance or retribution has been acknowledged as a permissible purpose of punishment under the Eighth Amendment (Williams v. New York (1949) 337 U.S. 241, 248, 69 S.Ct. 1079, 93 L.Ed. 1337), we do not sanction punishment solely for retribution in California. (In Re Estrada (1965) 63 Cal.2d 740, 745, 48 Cal. Rptr. 172, 408 P.2d 948.) We are fully aware that many condemned prisoners have committed crimes of the utmost cruelty and depravity and that such persons are not entitled to the slightest sympathy from society in the administration of justice or otherwise. Nevertheless, it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance.
>
> "Admittedly, isolation of the offender from society is a proper and often necessary goal of punishment and death does effectively serve that purpose. Society can be protected from convicted criminals, however, by far less onerous means than execution. In no sense can capital punishment be justified as 'necessary' to isolate the offender from society."
>
> 100 Cal. Rptr. at 167-68, 493 P.2d at 895-96.

I find that I am in agreement with the views thus expressed by the California Supreme Court. Life imprisonment without parole is an alternative that serves the functions of severely punishing the criminal and permanently protecting the society from the possibility of a repeated offense.

Some writers have attempted to justify the death penalty on the grounds that society needs to kill some criminals in order to deter others from potential crimes. After a century of debate, investigators and scholars are in disagreement, at best, about whether the death penalty in fact does deter crime; indeed, some argue that it has the opposite effect. To prove that the death penalty, in particular, is a deterrent would require more than proof that the possibility of punishment, in general, deters crime. The proof would have to show that there are potential crimes that are not committed because of the existence of the death penalty and that they would be committed otherwise. Such an inquiry, by its nature, would be highly speculative. In any event, my view is that, for the reasons discussed herein, the death penalty is a cruel and unusual punishment for the person upon whom it is inflicted and is, therefore, unconstitutional. Were it positively shown that the death penalty has a deterrent effect on others, it would still be unconstitutional because it is a cruel and unusual punishment for the person upon whom it is inflicted. In other words, deterrence, or the lack thereof, is irrelevant to the constitutional issue whether a particular punishment is cruel and unusual. Deterrent effect cannot save a cruel and unusual punishment.

E. Arbitrariness and capriciousness of the penalty.

I am convinced that it is inevitable that the death penalty will be applied capriciously and arbitrarily.[5] Again, I quote approvingly from the opinion of the Massachusetts court in Watson:

> "We know that, each year during the decades of the 1930s through the 1960s, thousands of persons were convicted of criminal homicides in states where death was an authorized punishment for those crimes. However, death was inflicted in only a minute fraction of those cases. 'When a country of over 200 million people inflicts an unusually severe punishment no more than fifty times a year, the inference is strong that the punishment is not regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.' Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring). No rational basis can be offered to explain why the few were executed and many others were not. It cannot be said that only the 'worst' offenders were executed. All murderers are extreme offenders. Fine distinctions, designed to select a very few from the many, are inescapably capricious when applied to murders and murderers. As a consequence, the death penalty is 'wantonly and . . . freakishly' inflicted. Furman v. Georgia, supra, at 310 (Stewart, J., concurring)."
>
> Watson, supra, at 1283-84.

I also agree with the Massachusetts court that while unguided jury discretion is intolerable, statutory guidelines cannot cure that uncertainty entirely; the subtle distinctions in the elements of crimes can be virtually impossible to define with certainty.

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[5] See, generally, C. Block, Capital Punishment: The Inevitability of Caprice and Mistake (1974); Block, Due Process for Death: Jurek v. Texas and Companion Cases, 26 Cath. U. L. Rev. 1 (1976).

"As Mr. Justice Harlan wrote in McGautha v. California, 402 U.S. 183, 204, 91 S.Ct. 1454, 1465, 28 L.Ed.2d 711 (1971): 'Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by . . . history . . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.'

"A basic criterion, for example, in 'channeling' the death penalty decision lies in the choice between first and second degree murder. Mr. Justice Cardozo said of the distinction between degrees of murder, that it is 'so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.' Cardozo, What Medicine Can Do For Law, in Law & Literature 100-101 (1931)."

Watson, supra, at 1284.

I think the Massachusetts court is correct in its conclusion that even if guidelines could cure the arbitrariness in the jury's determination of the crime and the sentence, the death penalty still would be arbitrarily inflicted because of the unguided, discretionary powers exercised by others in the judicial process:

"Power to decide rests not only in juries but in police officers, prosecutors, defense counsel, and trial judges. (Footnote omitted.)[6] In the totality of the process, most life or death decisions will be made by these officials, unguided and uncurbed by statutory standards. In any given case, decisions rest upon such considerations as the level of public outcry.

"Furman stands indifferent to the exercise of the prosecutor's 'untrammeled discretion.' For reasons which may be valid in the context of his duties, but which do not assist evenhandedness, the prosecutor in a homicide case may forego

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[6] I would add Governors to this list.

a first degree murder indictment and seek an indictment for second degree murder or a lesser charge. Also, in a first degree murder case, perhaps pursuant to plea bargaining, the prosecutor may in his uncurbed discretion nol prosse that part of the indictment which charges murder in the first degree. Similarly, the judge may dismiss the first degree murder charge, in his sole discretion, pursuant to accepting a plea of guilty to a lesser offense.[7]

"We do not think that our comments denigrate the general administration of criminal justice, or the good will of those who administer the system. It can be said that these officials must necessarily have these discretionary powers in the exercise of most of their functions. Nevertheless, the criminal justice system allows chance and caprice to continue to influence sentencing, and we are here dealing with the decisions as to who shall live and who shall die. With regard to the death penalty, such chance and caprice are unconstitutional under art. 26 . . . ."

Watson, supra, at 1285 (footnote omitted).

"We have a response to those who might argue that our comments as to arbitrariness and discrimination apply as well to all punishments, not merely to the death penalty. While other forms of punishment may also be arbitrary in some measure, the death penalty requires special scrutiny for constitutionality. 'The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.' Furman, supra, 408 U.S. at 306, 92 S.Ct. at 2760. (Stewart, J., concurring). Accord, Commonwealth v. O'Neal, 369 Mass. 242, 249, 339 N.E.2d 676 (Tauro, C.J., concurring). '[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.' Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Our society's failure to bring even-handedness to the entire spectrum of criminal punishment calls for great and persistent effort

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[7] Two of our recent cases serve as examples: Cozzolino v. State, supra, and State v. Berry, 592 S.W.2d 553 (Tenn. 1980). Both Cozzolino and Berry were convicted of first degree murder and sentenced to death. On appeal this Court ordered new trials. Upon the second trial, after a change of venue, Cozzolino's punishment was fixed at life imprisonment. After Berry's case was remanded for a new trial, his counsel and the prosecutor made a plea bargain that resulted in a sentence of life imprisonment. Same defendants, same crimes, same cases; but very different sentences resulted from the second proceedings.

> toward improvement. However, we are not required to abandon all such punishments on constitutional grounds. At the same time, the supreme punishment of death, inflicted as it is by chance and caprice, may not stand."
>
> Id. at 1286.

See also Furman v. Georgia, supra, at 286-300 and 287 n. 34 (Brennan, J., concurring); Lockett v. Ohio, supra, at 604-05 (opinion of Burger, C.J.).

I would apply the foregoing reasoning to the Tenness death penalty statute and hold that it is a cruel and unusual punishment prohibited by Article I, Section 16, of the Tennessee Constitution because, inevitably, it is arbitrarily and capriciously imposed.[8]

Conclusion.

The death penalty issue is a very complicated one; much more could be said about the subject than I have said. I adopt the following conclusion from the opinion of the California court in People v. Anderson, supra, to wit:

> "We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England: 'When we abolished the punishment for treason that you should be hanged, and then

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[8] I have treated arbitrariness and capriciousness of the infliction of the death penalty as an aspect of its being "cruel and unusual," as most courts have done. In my opinion this objection may also be considered as a lack of "due process."

> cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.' (268 Hansard, Parlimentary Debates (5th Series) (Lords, 43d Parl., First Sess., 1964-1965) (1965) p. 703.)"
>
> 100 Cal. Rptr. at 171, 493 P.2d at 899.

I would hold that the death penalty, under all circumstances, is a cruel and unusual punishment prohibited by Article I, Section 16, of the Constitution of Tennessee. Therefore, I dissent from the imposition of the death penalty in this case.

Fay Brock, Jr.

BROCK, C.J.

5581

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED
MAY 4 1981
JOHN A. PARKER, Clerk
By_____

STATE OF TENNESSEE,)
APPELLEE)
)
)
VS.) GREENE CRIMINAL
) DOCKET NUMBER 12
)
JEFFREY STUART DICKS,)
APPELLANT)

OPINION ON PETITION TO REHEAR

The petition to rehear filed on behalf of Jeffrey Stewart Dicks is denied at cost of the petitioner.

R E Cooper

Robert E. Cooper, Justice

Concur:
Harbison, C.J.
Fones, J.

Dissent:
Brock, J.

Exhibit "B"

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1980

Filed February 2, 1981
John A. Parker, Clerk

STATE OF TENNESSEE, APPELLEE	)	Greene Criminal (No. 5816)
VS.	)	Offense: First Degree Murder
JEFFREY STUART DICKS, APPELLANT	)	AFFIRMED (Death by Electrocution)

JUDGMENT ORDER

Came the Appellant, Jeffrey Stuart Dicks, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on oral argument, briefs of the parties, and the transcript of the record from the Criminal Court of Greene County; and upon consideration thereof the Court is of the opinion that there is no reversible error on the record and that the judgment of the trial court should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is, therefore, ordered and adjudged by the Court that the Appellant, for his offense of First Degree Murder, be remanded to the custody of the Warden of the penitentiary of the State of Tennessee, to be by said Warden safely kept until July 15, 1981, when the Appellant, Jeffrey Stuart Dicks, shall be taken by the Warden of the State Penitentiary at Nashville, when and on which day, within lawful hours on the said July 15, 1981, in said penitentiary, and in the death chamber, as provided by law, the said Warden of the penitentiary shall cause the body of the Appellant, Jeffrey Stuart Dicks, to be subjected to shock by a sufficient current of electricity until he is dead.

Exhibit "C"

Appellant will pay the costs of the cause accrued in this Court, and in the court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Greene County, directing that court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Honorable Lamar Alexander, Governor of the State of Tennessee; to the Warden of the State Penitentiary; to the Sheriff of Greene County; and to the Clerk of the Criminal Court of Greene County.

Robert E. Cooper, J.
Wm. H. D. Fones, J.
William J. Harbison, J.

Brock, C.J., Dissents

5581

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1980

Filed May 4, 1981
John A. Parker, Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLEE	)	S/C NO. 12 - Greene Criminal (No. 5816)
	)	
	)	
VS.	)	Offense: First Degree Murder (Death by Electrocution)
	)	
JEFFREY STUART DICKS,	)	
	)	
APPELLANT	)	

PETITION TO REHEAR DENIED

This cause came on to be further heard on the Petition to Rehear filed by the Appellant, Jeffrey Stuart Dicks, upon consideration whereof the Court is of the opinion the Petition to Rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the Petition to Rehear is denied.

Costs on the Petition to Rehear are adjudged against the Appellant, Jeffrey Stuart Dicks, for which let execution issue.

Robert E. Cooper, J.
William J. Harbison, C.J.
Wm. H. D. Fones, J.

Dissents:
Ray L. Brock, Jr., J.

Exhibit "D"

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81-5192

JEFFREY STUART DICKS,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM McMILLAN LEECH, JR.
Attorney General and Reporter

ROBERT LOUIS JOLLEY, JR.
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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Tennessee Supreme Court's determination that Barbara Davis' testimony concerning her impressions of co-participant Strouth's statements were inadmissible presents a substantial federal constitutional question.

2. Whether the imposition of a sentence of death upon an active participant in a felony-murder is unconstitutional.

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OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 615 S.W.2d 126.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on February 2, 1981. Petitioner's petition to rehear was denied on May 4, 1981. Petitioner timely filed his Petition for Writ of Certiorari with this court.

STATEMENT OF THE CASE

Jeffrey Stuart Dicks was indicted for first degree murder by the Sullivan County Grand Jury on May 2, 1978. (R. [orders, pleadings, and minute entries] 4). The jury selection process began on February 6, 1979, and was completed on February 7, 1979. On February 7, 1979, the petitioner's trial began upon his plea of not guilty. (R. [orders, pleadings, and minute entries] 27-29).

During the guilt phase of the trial, petitioner proposed to call, as a witness, his co-defendant Donald Strouth who had been previously convicted for this offense and sentenced to death. Strouth, whose case was pending appeal, claimed his Fifth Amendment privilege against self-incrimination. (R. [transcript] 1206-1214). After Strouth claimed his Fifth Amendment privilege, petitioner proposed to recall Barbara Davis to the stand. Ms. Davis was examined outside the presence of the jury concerning certain statements made to her by Strouth (R. [transcript] 1212-1226). Her testimony indicates that in talking to Strouth she obtained the impression that Strouth was taking responsibility for the whole thing. (R. [transcript] 1221). Strouth did not say anything to her about the petitioner's participation in this matter. (R. [transcript] 1225-1226). The trial judge ruled that he would not allow her impressions

into evidence since they did not affect the petitioner's involvement in the crime. (R. [transcript] 1228). Certain statements given by Strouth to Agent Keesling were admitted for identification, Exhibits 17 and 18. (R. [transcript] 1230-1233). Petitioner did not contend that these statements by Strouth to the police officers should have been admitted as being against Strouth's penal interests. See (R. [transcript] 1229-1230).

After hearing the evidence and deliberating, the jury found petitioner guilty of murder in the first degree on February 9, 1979 (R. [orders, etc.] 35). On February 10, 1979, the jury heard the evidence presented regarding sentencing. Petitioner did not seek to introduce any evidence concerning Strouth's statements. After due deliberation, the jury sentenced petitioner to death. (R. [orders, etc.] 39). The jury unanimously found the following statutory aggravating circumstances: "The murder was especially heinous, atrocious or cruel in that it involved torture and depravity of mind;" (2) "the murder was committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing or placing of a destructive device or bomb." The jury unanimously found that "there are no mitigating circumstances sufficiently substantial to ourweigh the statutory aggravating circumstance or circumstances so listed above." (R. [transcript] 1442-1443).

Petitioner appealed to the Tennessee Supreme Court which affirmed the judgment.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this court or decide such a question in a way not in accord with the applicable decisions of this court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

THE DETERMINATION THAT BARBARA DAVIS' TESTIMONY OF HER IMPRESSIONS FROM STROUTH'S STATEMENTS WAS INADMISSIBLE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In Smith v. State, 587 S.W.2d 659 (Tenn. 1979), the Tennessee Supreme Court extended to criminal cases, its prior adoption of the declaration against penal interest as an exception to the hearsay rule. The court found, however, in this case, that that exception was not applicable since petitioner sought to have Ms. Davis testify concerning her impressions formed from conversations she had with Strouth. Ms. Davis' proposed testimony shows no statements against Strouth's penal interests relevant to petitioner's participation in this felony-murder. Strouth made no statements to Ms. Davis in which he took full responsibility for this offense. The extent of petitioner's participation in the offense was not a direct subject of conversation. Thus, Strouth's statements to her were not relevant since even the petitioner's evidence showed a degree of participation in the felony of armed robbery. Furthermore, any

statements made by Strouth which were exculpatory to petitioner, except one in which Strouth assumed full responsibility for all actions inside the Budget Shop, would not be against Strouth's penal interest and would not come within his hearsay exception. Thus, testimony by Ms. Davis does not show any reliable or relevant statement against penal interest such as that present in the exculpating evidence sought to be presented in Chambers v. Mississippi, 410 U.S. 284 (1973).

Additionally, Strouth had given previous statements, Exhibit 17, which clearly inculpated petitioner as a direct participant in this crime. Such statements would not be admissible under the rules of Bruton v. United States, 391 U.S. 123 (1968) or Douglas v. Alabama, 380 U.S. 415 (1965). Thus, were any statements made by Strouth to Ms. Davis admissible, the State would be constitutionally precluded from showing inconsistent statements by Strouth on the petitioner's role in this affair. As the trial judge aptly stated to defense counsel, "You're saying you want to eat blackberries but you want to do it without getting stain on your hands." (R. [transcript] 1224).

Petitioner did not seek to admit Ms. Davis' testimony at sentencing, probably because the restrictions of Bruton and Douglas might be lifted. Thus, Green v. Georgia, 442 U.S. 95 (1979) is totally inapplicable to these proceedings.

Under such circumstances, petitioner has not raised an issue which warrants the granting of the writ of certiorari.

II.

A DEATH SENTENCE MAY PROPERLY BE IMPOSED UPON PETITIONER WHOM THE EVIDENCE SHOWS TO BE AN ACTIVE PARTICIPANT IN THIS FELONY MURDER.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court specifically reserved the question of whether "the death penalty is constitutionally disproportionate for one who had not been proven to have taken life, to have attempted to take life, or to have intended to take life." Mr. Justice

White, dissenting in part and concurring in the judgment of the Court in Lockett has stated he would hold "that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death, . . ."

In Lockett v. Ohio, 438 U.S. 586 (1978), the factual circumstances show only that Lockett was outside in the car while the robbery, in which the unplanned homicide occurred, took place. In the instant case, the evidence presented to the jury at sentencing supports other inferences concerning the degree of petitioner's participation.

The jury in this case was instructed to consider as mitigating circumstances the factual theory presented by the defendant's testimony and the defendant's witness' testimony at trial and now being presented in this petition. (R. [transcript] 1436). The jury rejected petitioner's contention that he was merely waiting outside in the car while Strouth went inside the Budget Shop. Evidence supports such a rejection. The police officers found two sets of footprints leading from the side door of the Budget Shop. Ms. Casteel noticed both the petitioner and Strouth running from the entrance of the alleyway at 11:45 a.m. Mr. Keegan's death occurred shortly before noon. Two weapons were used in the assault. Such evidence supports a finding that petitioner participated in this homicide in which the throat of an unconscious man was calmly slit. The circumstances of Mr. Keegan's death would also support a finding of premeditation. Dicks, 615 S.W.2d at 130.

Under such factual circumstances, the decision of the Tennessee Supreme Court finding the jury could reasonably conclude the defendant was an active participant in this offense does not present a substantial federal question. The decision is also in accord with the decisions of other state courts of last resort which have addressed this issue. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980); Jacobs (Sonia) v. State, 396 So.2d 713 (Fla. 1981); Jacobs

(Eligaah) v. State, 396 So.2d 1113 (Fla. 1981). See Enmund v. State, 399 So.2d 1362 (Fla. 1981). The petitioner has not raised an issue which warrants the granting of the writ of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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